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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

ROSARIO STRANO AND VITO STRANO
d/b/a STRANO FARMS,

Petitioners,

vs.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW,
OFFICE OF CHIEF ADMINISTRATIVE HEARING
OFFICER, PEDRO TASEJ-CACATZUM, BERNARDO
HERNANDEZ-VELAZQUES, AND MARIANO
MARCOS-FRANCISCO,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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105 pp

QUESTION PRESENTED FOR REVIEW

Whether Congress has the power to assign to an administrative tribunal, which does not use juries as fact finders, a dispute involving the award of lost wages from one private party to another private party for violation of the unfair immigration related employment practices provisions of 8 *U.S.C.* §1324b.

PARTIES TO THE PROCEEDING

Pedro Tasej-Cacatzum

Bernardo Hernandez-Velasquez

William Ho-Gonzalez, Special Counsel for Unfair Immigration Related Employment Practices

Mariano Marcos-Francisco

Rosario Strano

Vito Strano

Strano Farms

United States Department of Justice

Executive Office for Immigration Review, Office of Chief Administrative Hearing Officer

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED BY COURTS OR ADMINISTRATIVE AGENCIES

1. *In re: Charges of Pedro Tasej-Cacatzum, Mariano Marcos-Francisco & Bernardo Hernandez-Velazques, United States of America, Complainants v. Rosario Strano and Vito Strano, d/b/a Strano Farms, Respondent,* OCAHO Case No. 93B00182, Decision and Order, March 28, 1995, 5 OCAHO 748, 1995 WL 367114 (O.C.A.H.O.).

2. *Rosario Strano, Vito Strano d.b.a. Strano Farms, Petitioners v. United States Department of Justice Executive Office for Immigration Review, Office of Chief Administrative Hearing Officer, Pedro Tasej-Cacatzum, Mariano Marcos-Francisco, Bernardo Hernandez-Velasques, Respondents,* 98 F.3d 1353 (Table) (11th Cir., Sept. 27, 1996) (No. 95-4654), rehearing denied, December 18, 1996.

3. *In re: Charges of Pedro Tasej-Cacatzum, Mariano Marcos-Francisco & Bernardo Hernandez-Velazques, United States of America, Complainants v. Rosario Strano and Vito Strano, d/b/a Strano Farms, Respondent,* OCAHO Case No. 93B00182, Order Denying Respondents' Demand For Jury Trial, April 12, 1994, 4 OCAHO 623, 1994 WL 287021 (O.C.A.H.O.).

STATEMENT OF THE BASIS OF JURISDICTION

Jurisdiction is conferred upon this Court by 28 *U.S.C.* §1254(1), providing for review by the Supreme Court by writ of certiorari of cases in the courts of appeals.

Judgment was entered by the United States Court of Appeals for the Eleventh Circuit on September 27, 1996, in Case No. 95-4654. Petitioners timely sought rehearing *en banc*, which was denied by order filed December 18, 1996. Mandate was issued on December 27, 1996. Under Eleventh Circuit Rules 35-6 and 35-7, a petition for rehearing *en banc* stays issuance of mandate.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitution

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Seventh Amendment, United States Constitution

Statutory Provisions

> It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 1324a(h)(3) of this section) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment –
>
> (A) because of such individual's national origin, or

(B) in the case of a protected individual (as defined in paragraph (3)), because of such individual's citizenship status.

8 *U.S.C.* §1324b(a)(1).

For purposes of paragraph (1), a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

8 *U.S.C.* §1324b(a)(6).

(1) Order

The administrative law judge shall issue and cause to be served on the parties to the proceeding an order, which shall be final unless appealed as provided under subsection (i) of this section.

(2) Orders finding violations

(A) In general

If, upon the preponderance of the evidence, an administrative law judge determines that any person or entity named in the complaint has engaged in or is engaging in any such unfair immigration-related employment practice, then the judge shall state his findings of fact and shall issue and cause to be served on such person or entity an order which requires such person or entity to cease and desist from such unfair immigration-related employment practice.

(B) Contents of order

Such an order also may require the person or entity –

* * *

(iii) to hire individuals directly and adversely affected, with or without back pay;

8 *U.S.C.* §1324b(g)(1) and (2)(A),(B)(iii)

Any person filing a charge with the Special Counsel respecting an unfair immigration-related employment practice shall be considered a party to any complaint before an administrative law judge respecting such practice and any subsequent appeal respecting that complaint. In the discretion of the judge conducting the hearing, any other person may be allowed to intervene in the proceeding and to present testimony.

8 *U.S.C.* §1324b(e)(3)

STATEMENT OF THE CASE

Facts material to consideration of question presented.

Strano Farms grows several thousand acres of tomatoes in Dade County, Florida, and employs 200 to 300 people for seven months of each year. (R.0004). On February 25, 1993, several crews of harvest laborers were assembled at one of Strano's tomato fields by several crew leaders (farm labor contractors) (R.0003), including Augustin Munoz, who was the employer of the six individuals whose complaints started this proceeding. Under Strano's arrangement with his farm labor contractors, it is

the contractor's responsibility to perform the employment eligibility verifications required by 8 *U.S.C.* §1324a(b), including filling out and maintaining the forms used in doing so. (R.0005). On occasions when Munoz brought new people to work, as happened on February 25, 1993, Mr. Strano would sometimes check the underlying work authorization and identity documents for the harvest personnel. (R.382-3) (testimony of Munoz). The request for these documents was made through the contractor. (R.381-2). As Mr. Strano was looking at the documents on this day, several people who had shown Mr. Strano their documents and gotten them back attempted to surreptitiously transfer their document to others so that they could be tendered to Mr. Strano again as if they pertained to the transferee. Eventually, it became apparent that persons without their own work authorization and identity documents would not be allowed to work, and a large group of people left the field. Six of them found their way to an immigration rights advocacy group (South Dade Immigration Services, Inc.), which filed the charges giving rise to this proceeding. (R.0558-0560).

Course of proceedings and disposition.

This matter was commenced on October 6, 1993, by the Office of Special Counsel for Immigration Related Unfair Employment Practices [8 *U.S.C.* §1324b(c)] filing a complaint on behalf of the six named private individuals and the United States (R.1627) with the Office of Chief Administrative Hearing Officer, Executive Office of Immigration Review (hereafter OCAHO), pursuant to 8 *U.S.C.* § 1324b(d) and (e). The complaint alleged that

Strano had discriminated against the six individual complainants by denying them employment because they failed to present particular I.N.S. issued documents allegedly demanded of them by Strano, in violation of 8 *U.S.C.* §1324b. R.1627. The relief requested included civil money penalties for the government and back pay for the six individual complainants, but did not seek an order requiring the individual complainants to be hired.

Strano filed a written demand for jury trial due to the presence of the back pay claims brought by the individual complainants. (R.1579) This demand for jury trial was stricken by the administrative tribunal, *sua sponte*. (R. 1546) Three of the six private individual complainants were eventually dropped as parties for non-cooperation on discovery.

The case was tried on September 15, 1994 and September 16, 1994, and decided by a decision and order entered on March 28, 1995, assessing over $100,000.00 in penalties, back pay, and other relief. The back pay award was to two of the three individual complainants. R. 0025. The back pay request for one of the remaining three private individuals was withdrawn since he had presented an expired work authorization document and was thus not entitled to work.[1] R. 0023.

The petition for review was filed with the Clerk of the Court of Appeals for the Eleventh Circuit on May 22, 1995, within the sixty (60) days provided by 8 *U.S.C.* §1324b(i)(1). The jury issue was briefed. Oral argument

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[1] Nonetheless, the Stranos were fined for not hiring this individual (R. 0017; 0022).

was had on September 10, 1996. The panel affirmed, without opinion, on September 27, 1996. A timely Suggestion of Rehearing *En Banc* was filed on November 8, 1996, which, under *11th Cir.R.* 35-6 is also treated as a petition for rehearing and stays issuance of the mandate under *11th Cir.R.* 35-7. The Eleventh Circuit Court of Appeals denied rehearing and the suggestion of rehearing en banc by order entered December 18, 1996. The mandate issued December 27, 1996.

ARGUMENT

The issue of the right to jury trial of claims of private individuals seeking back pay from prospective private employers for alleged violation of the Immigration Reform and Control Act presents an important question of federal constitutional law which has not been, but should be, settled by this Court. The decision sought to be reviewed affirms, without opinion, the decision of the administrative agency which denied the Stranos' demand for trial by jury and proceeded to hearing before the administrative tribunal. The decision below conflicts with relevant decisions of this Court regarding the right to jury trial guaranteed by the Seventh Amendment to the Constitution of the United States, and with earlier decisions of the U.S. Court of Appeals for the Fifth Circuit.

Petitioners will first discuss the relevant portions of the Immigration Reform and Control Act (8 *U.S.C.* §§1324a, 1324b, and 1324c) and follow with an analysis of relevant case law of this Court which conflicts with the decision sought to be reviewed in the case at bar.

A Brief Overview of the Immigration Reform and Control Act (I.R.C.A.)

The Immigration Reform and Control Act (8 *U.S.C.* §§1324a, 1324b, and 1324c) is a product of Congress' last realization that it had lost, and needed to regain, control of the country's borders. To reduce the number of illegal aliens already in the country, Congress simply legalized vast numbers of people. *P.L.* 99-603 §201, *et seq.*, (codified primarily to 8 *U.S.C.* §1255a). Not wishing to encourage the accretion of a new pool of unlawful residents, and recognizing that the government's institutional efforts at policing the borders had been ineffective, the Congress enlisted the help of employers in enforcement of the Act. This step is embodied in 8 *U.S.C.* §1324a, which allows employers to hire only persons possessing certain particular documents establishing their identity and lawful authority to work in the United States. The list of suitable documents was to be provided by the Attorney General, and rapidly grew into what the Justice Department itself (and other agencies) have termed a "confusing number" (27) of qualifying documents, whose proliferation has caused inadvertent discrimination. 58 F.R. 61846 (11/23/93).

Recognizing that administration of these documentary requirements would be troublesome for employers, and that most employers would try to comply with the law, Congress foresaw that employers might, to simplify paperwork and minimize their exposure to liability under §1324a, discriminate against the employment of aliens generally or at least discriminate against those aliens as to whose work eligibility the employer had a subjective question. Congress therefore enacted 8 *U.S.C.* §1324b,

which requires that an employer *must* hire, for an available job, a person who produces any combination of documents that satisfy §1324a.

The provisions controlling liability under §1324b are as follows:

> It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 1324a(h)(3) of this section) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from emnployment –
>
> (A) because of such individual's national origin, or
>
> (B) in the case of a protected individual (as defined in paragraph (3)), because of such individual's citizenship status.

8 *U.S.C.* §1324b(a)(1).

In 1990, an amendment expanded the concept of "discrimination" to include the notion that:

> . . . a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

8 *U.S.C.* §1324b(a)(6).

Violations implicating this provision are referred to herein as "document abuse" violations.

The statutory provision actually raising the issue presented is 8 *U.S.C.* §1324b(g):

> **(1) Order**
>
> The administrative law judge shall issue and cause to be served on the parties to the proceeding an order, which shall be final unless appealed as provided under subsection (i) of this section.
>
> **(2) Orders finding violations**
>
> **(A) In general**
>
> If, upon the preponderance of the evidence, an administrative law judge determines that any person or entity named in the complaint has engaged in or is engaging in any such unfair immigration-related employment practice, then the judge shall state his findings of fact and shall issue and cause to be served on such person or entity an order which requires such person or entity to cease and desist from such unfair immigration-related employment practice.
>
> **(B) Contents of order**
>
> Such an order also may require the person or entity –
>
> * * *
>
> (iii) to hire individuals directly and adversely affected, **with or without back pay;** [e.s.]

Jury Trial

There is no decision regarding the right to jury trial on back wage claims under *I.R.C.A.* Section 1324b is modeled after *Title* VII, in which there has been considerable litigation, but no definitive resolution, of the right to jury trial on back pay components of a claim. *Landgraf v. USI Film Products*, 511 U.S. 244; 114 S.Ct. 1483, 1490 (f.n.4) (1994). At bottom, though, the issue is one of constitutional law, not controlled by the statute giving rise to the dispute. The nature of back pay awards as common law or common law-analogous claims, carrying a right to jury trial, has been authoritatively decided by this Court. In *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1990), the Court characterized the issue and result as follows:

> This case presents the question whether an employee who seeks relief in the form of back pay for a union's alleged breach of its duty of fair representation has a right to trial by jury. We hold that the Seventh Amendment entitles such a plaintiff to a jury trial.

494 U.S. at 561. In *Terry*, as here, the cause of action was entirely statutory, that in *Terry* arising under the *N.L.R.A.*, 29 U.S.C. §159(a). The test under the Seventh Amendment is whether, at common law, the rights being adjudicated would be legal or equitable in nature (*id.* at 564), for which the analysis is:

> To determine whether a particular action will resolve legal rights, we examine both the nature of the issues involved and the remedy sought. "First, we compare the statutory action to 18th-century actions brought in the courts of England

> prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature." *Tull, supra,* 481 U.S., at 417-418, 107 S.Ct., at 1835-1836 (citations omitted). The second inquiry is the more important in our analysis. *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 42, 109 S.Ct. 2782, 2790, 106 L.Ed.2d 26 (1989).

(*Id.* at 565). It is the nature of the issue claimed to merit jury trial, not the nature of the "overall action", which determines the right to jury. *Id.* at 569. *Ross v. Bernhard,* 396 U.S. 531 (1970).

On the first criterion under *Terry,* the action at bar is most analogous to one for breach of contract. The complaining parties had been recruited by a farm labor contractor to pick tomatoes in the Stranos' field. R. 0005. Mr. Strano was alleged to have refused to allow the individual complainants to perform the work for which they had been hired by the farm labor contractor and brought to his farm for reasons which are illegal under 8 *U.S.C.* §1324b(a)(6). This could not be more analogous to a breach of contract case at common law; one of the terms of the contract, albeit one dictated by statute, was violated, resulting in lost wages.

As for the second *Terry* factor, the nature of the remedy, it is the more important factor. *Granfinanciera v. Nordberg,* 492 U.S. 33, 42 (1989). The parties plaintiff in a case under 8 *U.S.C.* §1324b include, as in this case, both the government and the individual claimants, for whom government counsel is acting as counsel as well. 8 *U.S.C.* §1324b(e)(3) provides:

> Any person filing a charge with the Special Counsel respecting an unfair immigration-

> related employment practice **shall be considered a party to any complaint before an administrative law judge** respecting such practice and any subsequent appeal respecting that complaint. In the discretion of the judge conducting the hearing, any other person may be allowed to intervene in the proceeding and to present testimony. [e.s.]

The relief statutorily authorized for the individual complaining parties is an order "to hire individuals directly and adversely affected, with or without back pay". 8 *U.S.C.* §1324b(g)(2)(B)(iii). In the case at bar, the only relief sought by the individual complainants was lost wages. Compensatory damages for back pay or otherwise, was "the traditional form of relief offered in the courts of law". *Terry,* 494 U.S. at 570. As in *Terry,* the money sought by the individual complainants in this case is not a *res* perhaps subject to equitable disgorgement, but for wages they would have received had they not been prohibited from working. The Court found the back pay relief sought in *Terry* to be legal in nature, for which the Seventh Amendment requires jury trial. *Id.* at 573. The former Fifth Circuit held over 30 years ago that a suit brought by the Secretary of Labor, or by an employee, seeking to recover back pay (unpaid wages and overtime) under the Fair Labor Standards Act was a common law debt or assumpsit action and required jury trial. *Wirtz v. Jones,* 340 F.2d 901, 904 (5th Cir. 1965); *Lewis v. Times Publishing,* 185 F.2d 457 (5th Cir. 1950). The case for lost pay at bar cannot be rationally distinguished from *Terry, Wirtz,* or *Lewis.* The Eleventh Circuit's decision conflicts with all of the cited cases.

The government contended below that the administrative action involved public rights, not private rights, thus removing the case from the ambit of jury trial. This issue was authoritatively treated in *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989). *Granfinanciera* involved the question of whether a defendant in a bankruptcy court fraudulent transfer case was entitled to jury trial under the Seventh Amendment. The bankruptcy judge had ruled that fraudulent transfers, at common law, were equitable, non-jury actions. The district court affirmed. The Eleventh Circuit likewise affirmed on the grounds, as summarized by this Court, that (i) the bankruptcy code does not purport to allow jury trial in bankruptcy proceedings; (ii) bankruptcy cases are equitable in nature and thus fraudulent transfer proceedings in bankruptcy are inherently equitable even if money damages are in issue; and (iii) Congress may convert a legal right into an equitable one and thus displace the Seventh Amendment's guarantee of trial by jury. 492 U.S. at 37. This Court held that an action for a determinate sum of money in a fraudulent transfer action in late 18th century England would have been brought at law, not in equity. *Id.* at 46-7. The Court also held that the prayer for money judgment would preclude invoking equity under the common law. *Id.* at 47-8.

In *Granfinanciera* there were two assertions made to avoid the sweep of the Seventh Amendment, first that "public rights" were involved and second that requiring jury in bankruptcy would disrupt Congress' statutory scheme. The answers to these claims were that fraudulent transfer actions in bankruptcy involved "private rights" as previously defined in *Crowell v. Benson*, 285 U.S. 22

(1932): "Private right . . . is . . . the liability of one individual to another under the law as defined". *Granfinanciera* at f.n. 8. The Court concluded this point by saying "[u]nless a legal cause of action involves 'public rights,' Congress may not deprive parties litigating over such a right of the Seventh Amendment's guarantee to a jury trial". 492 U.S. at 53. Given that a bankruptcy trustee's suit would seek to recover money for distribution to a wider creditor body, not just single individuals, there was at least the whisper of an argument that public rights were involved. However the fact that the proceeds of the fraudulent transfer action might, if distributed under the bankruptcy hierarchical scheme, impact public rights could not change the fraudulent transfer suit into one involving "public rights". *Granfinanciera* at f.n. 11, 12. At bar, Congress' attempt to allow an administrative tribunal to order a private individual to pay money damages directly to another private individual, with such damages measured by common law contract principles, is an unconstitutional assignment of forum for adjudicating such private rights to common law damages. Congress' lack of power to do this is addressed in *Granfinanciera*:

> Congress may devise novel causes of action involving public rights free from the strictures of the Seventh Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders. [Footnote omitted] **But it lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury. As we recognized in *Atlas Roofing*, to hold otherwise would be to permit Congress to eviscerate the Seventh Amendment's guarantee by assigning to administrative agencies or courts**

> **of equity all causes of action not grounded in state law, whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forbears.** [citation omitted] The Constitution nowhere grants Congress such puissant authority. "[L]egal claims are not magically converted into equitable issues by their presentation to a court of equity," *Ross v. Bernhard*, 396 U.S. 531, 538, 90 S.Ct. 733, 738, 24 L.Ed.2d 729 (1970), nor can Congress conjure away the Seventh Amendment by mandating that traditional legal claims be brought there or taken to an administrative tribunal.

492 U.S. at 51-52 [e.s.].

> The decisive point is that in neither the 1978 Act nor the 1984 Amendments did Congress "creat[e] a new cause of action, and remedies therefor, unknown to the common law," because traditional rights and remedies were inadequate to cope with a manifest public problem. *Atlas Roofing*, 430 U.S., at 461, 97 S.Ct., at 1272. Rather, Congress simply reclassified a pre-existing, common-law cause of action that was not integrally related to the reformation of debtor-creditor relations and that apparently did not suffer from any grave deficiencies. This purely taxonomic change cannot alter our Seventh Amendment analysis. **Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or**

> **a specialized court of equity.** See Gibson 1022-1025.

492 U.S. at 60-61 [e.s.].

CONCLUSION

The decision of the Eleventh Circuit conflicts with this Court's decisions in *Terry* and *Granfinanciera,* and with earlier decision of the U.S. Court of Appeals for the Fifth Circuit. The decision below improperly affirms the administrative tribunal's rejection of Stranos' demand for jury trial in this case seeking the award of back pay to private parties. The claim by the private parties for back pay is one which carries the right to jury trial, which Congress lacks the power to assign to a tribunal which does not employ juries as factfinders. The issue of the right to jury trial of claims of private individuals seeking back pay for violation of the Immigration Control and Reform Act presents an important question of federal constitutional law affecting private persons and employers nationwide which should be settled by this Court.

Respectfully submitted,

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APPENDIX

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1. *Rosario Strano, Vito Strano d.b.a. Strano Farms, Petitioners v. United States Department of Justice Executive Office for Immigration Review, Office of Chief Administrative Hearing Officer, Pedro Tasej-Cacatzum, Mariano Marcos-Francisco, Bernardo Hernandez-Velasques, Respondents*, 98 F.3d 1353 (Table) (11th Cir., Sept. 27, 1996) (No. 95-4654) .....App. 1

2. Decision and Order, *In Re Charges of P. Cacatzum, et al. v. Rosario Strano & Vito Strano, d/b/a Strano Farms*, U.S. Department of Justice, Executive Office for Immigration Review, Office of the Chief Administrative Hearing Officer, OCAHO Case No. 93B00182 .....App. 2

3. *Rosario Strano, Vito Strano d.b.a. Strano Farms, Petitioners v. United States Department of Justice Executive Office for Immigration Review, Office of Chief Administrative Hearing Officer, Pedro Tasej-Cacatzum, Mariano Marcos-Francisco, Bernardo Hernandez-Velasques, Respondents*, 98 F.3d 1353 (Table) (11th Cir., Sept. 27, 1996) (No. 95-4654), rehearing denied, December 18, 1996 .....App. 43

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-4654
Non-Argument Calendar

No. 93-B00182

ROSARIO STRANO, VITO STRANO
d.b.a. STRANO FARMS,

Petitioners,

versus

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW,
OFFICE OF CHIEF ADMINISTRATIVE HEARING
OFFICER, PEDRO TASEJ-CACATZUM,
MARIANO MARCOS-FRANCISCO,
BERNARDO HERNANDEZ-VELASQUES,

Respondents.

Petition for Review of an Order of the
Office of the Chief Administrative Hearing Officer

(September 27, 1996)

Before HATCHETT and DUBINA, Circuit Judges, and COHILL*, Senior District Judge.

PER CURIAM:

AFFIRMED. See Circuit Rule 36-1.

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* Honorable Maurice B. Cohill, Jr., Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF
ADMINISTRATIVE HEARING OFFICER

March 28, 1995

IN RE CHARGES OF PEDRO TASEJ-CACATZUM MARIANO MARCOS-FRANCISCO, & BERNARDO HERNANDEZ-VELAZQUES,	)	8 U.S.C. 1324b Proceeding
UNITED STATES OF AMERICA, Complainants,	)	Case No. 93B00182
v.	)	
ROSARIO STRANO AND VITO STRANO, D/B/A STRANO FARMS, Respondent.	)	

DECISION AND ORDER

Appearances: Rose Briceno, Esquire, Anita J. Stephens, Esquire, Washington, D.C., for complainants; Robert M. Hustead, Esquire, Homestead, Florida, for respondent.

Before: Administrative Law Judge McGuire

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Addressed in this proceeding are the charges, among others, of three (3) migrant farm workers whose formal complaints are being prosecuted by the Department's Office of Special Counsel for Immigration-Related Unfair Employment Practices (complainant/OSC).

In the Complaint at issue, OSC alleges that in determining the employment eligibility of those three (3) charging parties, as well as other migrant farm worker applicants, respondent violated the document abuse and immigration-related employment discrimination provisions of the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986), enacted as an amendment to the Immigration and Nationality Act of 1952 (INA), as amended by the Immigration Act of 1990 (INMACT), Pub. L. No. 101-649, 104 Stat. 4978 (1990).

On March 10, 1993, six (6) migrant farm workers, Pascual Tasej-Cacatzum, Pedro Tasej-Cacatzum, Mariano Marcos-Francisco, Mario Miguel Mendez, Bernardo Hernandez-Velazquez and Lucas Pascual Lucas filed employment-related discrimination charges with OSC against Rosario and Vito Strano, d/b/a Strano Farms (respondent/Strano Farms), based upon alleged document abuse in the employment eligibility verification process.

In their charges, those six (6) gentlemen alleged that on February 25, 1993, some 13 days earlier, they had applied for work as farm workers at respondent's Dade County, Florida tomato growing operation, but were refused work because Rosario Strano, one of the two (2) partners in Strano Farms, had refused to accept as valid the INS documents which he had ordered them to produce in order to establish their employment eligibility.

Following the filing of those six (6) charges on March 10, 1993, OSC began an investigation, which included expanded inquiries concerning whether respondent had engaged in a pattern or practice of document abuse and/

or any other violative practices involving other migrant farm worker applicants.

On October 6, 1993, following its investigation, OSC filed the three (3)-count Complaint at issue.

In Count I, respondent is charged with having violated the document abuse provisions of 8 U.S.C. § 1324b(a)(6) by reason of having required that the original six (6) charging parties produce more and/or different documents than those required by law to establish identity and/or work eligibility namely, that respondent had demanded to be shown INS-issued documents in order to have them establish their employment eligibility.

In Count II, it is alleged that respondent also violated the wording of 8 U.S.C. § 1324b(a)(6) by having engaged in a pattern or practice of document abuse by reason of its having routinely requested that all alien farm worker applicants produce an INS-issued document as a precondition for employment, thus adversely affecting the rights of all work-authorized applicants.

And in Count III, Strano Farms was cited for having violated the unfair immigration-related discrimination provisions of 8 U.S.C. § 1324b(a)(1)(B) by reason of its having engaged in a proscribed pattern or practice of disparate treatment resulting from the alleged practice of requiring that applying aliens, who, although not United States citizens, were authorized to work in the United States, produce specific INS-issued documents as a precondition for employment whereas United States citizen farm worker applicants were hired upon having merely produced facially acceptable Form I-9 work eligibility documentation.

On November 8, 1993, respondent filed its Answer and thereafter the parties engaged in extensive discovery activities, which included scheduling the depositions of the six (6) original charging parties.

On August 19, 1994, OSC filed an unopposed pleading captioned Motion to Dismiss, in which it requested that three (3) of the original six (6) charging parties, Pascual T. Cacatzum, Mario Mendez, and Lucas Pascual Lucas, be dismissed as parties since "Messrs. Cacatzum, Mendez, and Lucas have failed to appear for depositions scheduled by the United States and have shown little or no interest in pursuing the complaint.".

On August 24, 1994, an order granting that motion was issued. Accordingly, those three (3) persons were ordered to be dismissed as charging parties, resulting in the charges of the three (3) remaining parties being prosecuted by OSC in this matter, those of Pedro Tasej-Cacatzum, Mariano Marcos-Francisco, and Bernardo Hernandez-Velazquez.

After proper notice to the parties, this matter was heard before the undersigned on September 15 and 16, 1994, in Homestead, Florida.

Summary of Evidence

Complainant's evidence consisted of the hearing testimony of six (6) witnesses in its case-in-chief, and that of a rebuttal witness, as well as placing into evidence the deposition testimony of the three (3) remaining charging parties (Complainant's Exhs. 5a, 5b, 5c) and three (3) written declarations of farm workers who had formerly

worked for Strano Farms (Complainant's Exhs. 6b, 6c, 6d).

The seven (7) witnesses who testified on the behalf of OSC at the hearing were Maria Escobar, a former outreach coordinator at South Dade Immigration Association, the agency to which the original six (6) charging parties presented their grievances against respondent on February 25, 1993; Miguel Garcia, Absolan Bonilla, and Manuel Jimenez, three (3) agricultural workers who had formerly worked for respondent; Ramon Ramos, who worked for respondent intermittently from 1989 to 1993 as a foreman and farm worker; Lisa Levine, an OSC investigator; and OSC's rebuttal witness, Augustin Munoz, who worked for respondent as a contractor and as a laborer for three (3) months in 1992 and for three (3) months in 1993.

In addition, complainant's evidence included 28 documentary exhibits which were marked and entered into evidence as Complainant's Exhibits 1, 3a thru 3f, 5a thru 5c, 6b thru 6d, 7 thru 9, 10 and 10a, 11a thru 11e, 12a, 12b, and 12e, and 13.

Respondent's evidence was comprised of the testimony of Rosario T. Strano, who with his brother, Vito Strano, form the two (2)-person partnership doing business as Strano Farms; Dr. Victor Pestien, an Associate Professor of Mathematics and Computer Science at the University of Miami; Thomas Vaughn, foreman and maintenance man at Strano Farms for 10-11 years; T.J. Price, another employee of Strano Brothers, who was present on the morning of February 25, 1993, at the tomato field identified only as 320, which is located on North Krome

Avenue, in the City of Homestead, in Dade County, Florida; and Pasqual Bermudez, a farm labor contractor and 28-year employee of Strano Farms, whose duties included the supervision of tomato pickers.

By way of background, and prior to summarizing the disputed facts, it might be well to discuss the operations of the business entity known as Strano Farms. Through the testimony of Rosario Strano, it was determined that he and his brother, Vito Strano, operate two (2) businesses. The first is the named respondent entity, which is a 50/50 partnership in which he and his brother Vito are engaged in growing tomatoes, pumpkins, yellow squash, green squash, beans, sweet corn, and zucchini on some 3,000 acres of farmland in Dade County, Florida. The respondent partnership owns four (4) or five (5) areas of farmland, consisting of some 1,000 acres in total, including a tomato growing area known only as 320, which are located within an eight (8)-mile radius of the firm's headquarters in Florida City, Florida. The partnership also leases about 2,000 acres of farmland positioned within a 19-mile radius of its headquarters (T. 88-97).

Rosario Strano also testified that he and his brother Vito are the sole and equal shareholders of a closely-held corporation known as Homestead Tomato Packing Company, which receives the harvested tomatoes for processing, packing and interstate marketing. During the six (6) to seven (7)-month annual harvest period, that corporation employs upwards of 200 to 300 employees, only three (3) of whom comprise the office staff, Soni Kearson, Nona Jo Long and Phyllis Ernst, the office manager. The operations of the Homestead Tomato Packing Company

are housed in a two (2)-story building measuring 300-feet in length and 120-feet in width.

The Stranos have operated those two (2) family businesses for some 40 years (T. 102). They are fairly capital intensive operations, requiring an investment of $5,000 to 6,000 an acre to produce a crop (T. 102), and extensive crop growing, harvesting and storage equipment, as well as some 12 tractor-trailer units, manned by six (6) drivers, plus a supervisory and maintenance work force.

The combined gross annual sales of the Stranos' two (2) operations were impacted negatively by Hurricane Andrew, which struck the Homestead area on August 24, 1992. Prior to that weather event, gross annual sales were $11 to 11.5-million and resulted in a net annual profit of $1.1-million, less undisclosed salary sums paid to each of the Strano brothers (T. 104). In 1993, following that tropical storm, annual gross sales had been reduced to about $3-million.

Although many facts have been placed in controversy, as demonstrated by the protracted and spirited discovery efforts of both parties, by the 629-page hearing transcript, and by the voluminous documentary evidence available to the fact finder, the happenings upon which we can most productively focus our decisional attention are those which took place on the morning of Thursday, February 25, 1993, on or close by one of Strano Farms' tomato growing fields which, as noted previously, has been described simply as 320, and is located on North Krome Avenue, in the City of Homestead, Dade County, Florida.

Rosario Strano, in the company of several of respondent's supervisionary employees, had gone to that tomato field on that morning to oversee the hiring and work efforts of migrant farm workers who were to pick a predetermined quantity of tomatoes that day.

In order to ensure that the required number of migrant farm workers would be assembled at that field on that date to pick the tomatoes, Strano had previously contacted Augustin Munoz, a crew leader/farm labor contractor, and requested that Munoz assemble the requested number of tomato pickers. Munoz did so, and apparently received an agreed upon sum from Strano for each worker who spent the day picking tomatoes. Counsel agree that it was Munoz' responsibility to prepare the Form I-9s for those tomato harvest workers.

Concerning the document abuse allegations in Count I, it was learned that on the morning of Thursday, February 25, 1993, an undetermined, but presumably a significant number, of upwards to 100, migrant farm workers came to the field known as 320 at Munoz' behest, in order to pick tomatoes. Before being allowed to do so, however, Rosario Strano checked the "papeles", or immigration papers, of all the aspirant tomato pickers in order to determine whether they had the specific INS-issued documents which Strano felt was required of each in order to satisfy the work eligibility requirements of IRCA. Only those farm workers whose documents met his standards were permitted to board a bus parked nearby for transport to the working areas of that field, and all of their tomato gathering efforts were closely directed and supervised by Strano and his supervisors.

It was shown that earlier, in 1992, Strano Farms had paid a civil penalty of some $100,000 for alleged IRCA violations involving the hiring of illegal immigrants and paperwork violations (T. 106, 107). Perhaps with that experience in mind, Strano demanded that each migrant field worker produce specified documentation and refused to hire those whose INS-issued documents he felt were either fraudulent or had expired. Strano rejected the work eligibility documentation proffered by the six (6) original charging parties, as well as 30 or 40 others on that date, all of whom resultingly left the field, and six (6) of whom went to the South Dade Immigration Association to complain about not having been hired on that date by Rosario Strano.

The deposition testimony of the three (3) remaining charging parties, discloses the following facts as they relate to the document abuse allegations in Count I. Pedro Tasej-Cacatzum testified on May 11, 1994, that Strano asked to see his work permit and that he produced his driver's license and Social Security card, which Strano refused to accept. He then offered his INS work permit, A07200916, which Strano also refused to accept and was ordered to leave the field. (Complainant's Exh. 5, at 8, 9). He attempted to board the bus to join those whose documents Strano had found to be acceptable, but was confronted at the door of the bus by two (2) of Strano's employees, who also asked to see his work permit, which they also felt was not valid. He then left the field and later that day visited the office of Maria Escobar, of South Date [sic] Immigration Association, to file a complaint. He also testified that he used the same documentation which Strano had refused to accept on February 25, 1993,

to secure farm work elsewhere since that time. He also stated that his rate of pay for picking tomatoes was forty ($0.40) cents for each bucket and that he could pick between 150 to 180 buckets daily, for a total gross daily wage of $60 to $72. Finally, he testified that he filed his charge with Maria Escobar because he felt that Strano had treated workers abusively, that he did not wish "to win from this case", and that he only wanted Strano to be told to discontinue that practice (Complainant's Exh. 5a, at 8, 9, 17, 18, 23).

The second remaining charging party, Bernardo Hernandez Velazquez, testified in his May 11, 1994, deposition that he is a permanent resident and that he had worked for Strano Farms on two (2) or three (3) occasions in 1993, using as work eligibility documents the same ones Strano had rejected on February 25, 1993. He stated that on that date he had been brought to the field by Augustin Munoz, and was there with about 80 others seeking work as tomato pickers. At Strano's request, he produced his INS document, Temporary Resident permit, A91773378, which Strano refused to accept. He then told Strano, to no avail, that as a permanent resident alien, he was eligible to work. He also futilely informed Strano that those documents had allowed him to work for Strano previously, as well as for other growers. He also then went to see Maria Escobar later that day and she in turn spoke to Strano. He also testified that he can pick 200 to 250 buckets of tomatoes in a workday involving the first picking and is paid at the rate of $0.40 per bucket. His wish is that Strano be reprimanded, as opposed to an expectation that he "win from this case" (Complainant's Exh. 5b).

The third remaining charging party, Mariano Marcos-Francisco, gave his deposition testimony on April 15, 1994 (Complainant's Exh. 5c). He went to Strano's tomato field on February 25, 1993, and asked Augustin Munoz for work. Later, Strano asked him to produce work eligibility documentation, and he produced his INS Resident Alien card, A91902873, containing his photograph and Social Security number. Strano refused to accept that document and declined to hire him whereupon he went to Maria Escobar's office later that day. He found other work some seven (7) days later. Strano's pay rate was $0.40 per bucket for tomato picking and he stated that he can pick about 150 buckets daily. The INS document which Strano refused to accept on February 25, 1993, was the same one he had provided to other employers in securing work before and after that date. In fact, he worked in Munoz' crew on Strano's fields on February 23 and 24, 1993, or immediately prior to Strano's refusal to hire him on February 25, 1993. He also testified that Strano had also refused to hire 25 or 30 others on that date.

All three (3) of these remaining charging parties testified that they saw none of the migrant farm workers exchange their valid INS work eligibility documents with other migrant workers who may not have possessed such valid documentation on the morning of February 25, 1993. That fact was disputed by the testimony of Strano employees Thomas Vaughn and T. J. Price, who stated that such documents were being exchanged behind the bus which was parked nearby, and that they had advised Strano of that fact.

Moving to the allegations contained in Count II, those involving an alleged pattern or practice of document abuse, complainant relies primarily upon the testimony of Ms. Lisa Levine, its investigator, and the pertinent documentary exhibits identified as Complainant's Exhs. 10 and 10a. The former is the single-page summary and analysis of the information contained in the 242 Forms I-9 copies prepared by Strano Farms personnel between October 10, 1992, and September 7, 1993, which were provided to OSC by Strano Farms, and Complainant's Exh. 10a consists of the photocopies of those 242 Forms I-9.

An analysis of that documentation reveals that 204 of the 242 Forms I-9, or 84 per-cent, involved alien, or non-citizen, farm worker applicants, and the remaining 38, or 16 per-cent, had been prepared by farm worker applicants who were United States citizens. And that analysis also clearly discloses that when requesting Form I-9 employment eligibility verification documents from all migrant farm worker applicants, Strano's employees had requested INS-issued documents from the 204 non-citizens on 193 occasions, or at a 95 per-cent frequency rate, and had accepted other facially acceptable documents from the remaining 11 alien applicants, or at only a 5 per-cent frequency rate.

But when requesting employment eligibility documentation from the 38 farm worker applicants who were United States citizens, no INS-issued documents had been supplied. Instead, and without exception, the more conventional and frequently utilized qualifying document combinations were presented and/or requested or accepted, those being predominantly State-issued drivers

licenses, or State-issued I.D. cards and Social Security cards, among other combinations.

Ms. Levine testified that as an OSC investigator, she assists in the investigations of unfair immigration-related employment practices, including alleged document abuse, and has examined and analyzed thousands of completed Forms I-9 in connection with those duties.

Her routine work assignments include interviewing and securing sworn statements from charging parties and witnesses in IRCA-related matters, and she regularly examines and analyzes various INS forms, Forms I-9, and INS alien status reports (T. 298).

She stated that in this investigation, Strano Farms had originally provided 53 Forms I-9 for the period March to September, 1993, and she later received some 230 additional Forms I-9 for the period from October 10, 1992 to September 7, 1993, or seemingly a total of 283 Forms I-9 copies (T. 302). However, after comparing those two (2) sets of documents, she noted that 41 of the original 53 Forms I-9 had been included in the 230-form delivery but that the remaining 12 forms copies included in the original number had not been included in that group. In order to isolate and distinguish those 12 forms, she simply made copies of those 12 on green paper, as opposed to the regular white photocopy paper.

After reviewing all of the 242 Forms I-9 copies provided by Strano Farms, several form completion errors were noted. In addition, those forms did not have the usual copies of work eligibility documents attached, despite there having been staple marks on some 80 of the

242 Forms I-9 copies, raising the inference that the preparer had utilized documentation received from the applicant but had chosen to remove those document copies from the Forms I-9 copies prior to furnishing those copies to OSC, as requested. In addition, the handwriting in section 1 of the Forms I-9, or that section to be completed by either the job applicant or a preparer, appeared to be similar on some 80 of the Forms I-9, but no one had signed any of those forms to show that a preparer had assisted the applicant (T. 311, 319).

Ms. Levine reasoned, and correctly so, given those circumstances, that if a person other than the job applicant had completed section 1 of the Form I-9 and had provided the pertinent numbers and expiration dates contained on INS-issued documents, such information could only have been obtained by having practiced document abuse by having improperly requested that the migrant farm worker applicant supply specific work eligibility documentation to the preparer.

She also believes, with an equal measure of logic, that the violative document abuse practice was confirmed by the July 29, 1993, deposition of Phyllis Ernst, respondent's office manager, to the effect that, as the person responsible for completing all Forms I-9 at Strano Farms, she routinely requested that all alien farm worker applicants produce INS-issued documents which contained that person's alien number and the work authorization expiration date (T. 123, Complainant's Exh. 19).

Ms. Levine concluded that based upon her analysis of the 242 Forms I-9 copies provided by Strano Farms, together with the admitted improper documentation

practices in which Phyllis Ernst and/or her subordinates had engaged on respondent's behalf, clear patterns or practices of document abuse and citizenship status discrimination have been demonstrated.

In addition to Ms. Levine's testimony and analysis, OSC also elicited the hearing testimony of three (3) former Strano Farms migrant farm workers upon whom it alleges respondent also practiced document abuse. Absalon Bonilla testified that in 1988, in the course of applying for work at Strano Farms, Strano required him to produce an INS-issued immigration card as a precondition (T. 138). He did so again in 1992 when Bonilla returned to work at Strano Farms (T. 140, 142). Miguel Garcia testified that prior to working at Strano Farms in 1992 and again in 1993 Strano requested that he produce INS documents and his Social Security card (T. 115, 125, 126, 128). And Manuel Jimenez also testified that over the course of working at Strano Farms for three (3) days in late February, 1993, presumably on or close on to the dates concerning the events at issue, he witnessed Strano instruct the field worker applicants to produce certain INS documentation (T. 154).

In order to lend further support to its Count II charge of a pattern or practice of document abuse, OSC has also provided three (3) written declarations from Jesus Jimenez, Rosa Calderon, and Ovino Calderon, which were identified and entered into evidence as Complainant's Exhs. 6b, 6c, and 6d, respectively.

Jesus Jimenez declared that he had jointly worked for Augustin Munoz and Strano Farms in January, February, and March, 1993, and that Strano had demanded and

examined his immigration papers as a precondition of employment. He further advised that he had not completed any Forms I-9 on those occasions (Complainant's Exh. 6b).

Rosa Calderon worked for Rosario Strano in November, 1991, in January, 1994, and again in April, 1994. On the first occasion he was requested to produce a Social Security and an immigration card. In January, 1994, he sought work at Homestead Tomato Packing Company and was requested to furnish an INS work authorization card by a woman named "Betty" (Complainant's Exh. 6c).

Ovino Calderon recited in his declaration that he became an alien authorized to work in the United States in 1988 and that he worked for Rosario Strano in that year, as well as in 1990 and 1991. In February, 1991, one of respondent's Spanish-speaking secretaries requested to see his immigration and Social Security cards (Complainant's Exh. 6d).

In order to challenge OSC's evidence in this area, respondent elicited testimony from its expert witness, Dr. Victor Pestien, an Associate Professor of Mathematics and Computer Science at the University of Miami, where he teaches and conducts research in the areas of probability and statistics (T. 60).

Upon reviewing the 242 Forms I-9 copies which comprise Complainant's Exh. 10a, Dr. Pestien testified quite oppositely to Ms. Levine. Based upon his review of those same forms he testified that he could not "reach any conclusions with regard to the hiring practices or patterns at Strano Farms" (T. 63). That because the information available from that source is insufficient "to form a basis

for a proper statistical investigation.", and that in order to do so he would also "need information about a population, a population from which this collection of numbers forms a random sample. I would need information about values of parameters in a population so that I could calculate, calculate confidential intervals, standard deviations, use standard statistical methods to form a hypothesis." (T. 64).

When asked a follow-up question concerning the population, or pool of people, to whom that information applied, he testified that he would "Need information about job applicants and information about which categories, noncitizen, citizen, INS-issued documents, other documents, numerical proportions of categories in large populations to which I could compare these specific sample number." (T. 64).

Upon having been requested to assume that that information had been made available, he further testified that "If I had that information I would be able to compare sample proportions with population proportions and then make statistical inferences about how extreme this data is compared to certain standards." And when queried as to the manner in which he would "make that analysis with regard to the extremity of the data", Dr. Pestien replied, "There are standard statistical methods. We calculate differences between the numbers of appropriate samples and population proportions and on that basis measure standard deviation and measure likelihood that a certain random interval would contain the true mean if these numbers had been obtained." (T. 65).

In summary, Dr. Pestien testified that given the paucity of data in the 242 Forms I-9 copies comprising Complainant's Exh. 10a, he was unable to "make any statistical inferences based on those numbers" (T. 78).

Dr. Pestien's testimony on cross-examination provided the following facts. He stated that he has testified only once previously in the last four (4) years, in a case involving Medicaid fraud, in which his role consisted of examining and rendering an opinion concerning the statistical aspects of pharmacy records for Medicaid eligibility purposes (T. 70, 71). His knowledge of employment discrimination law consists of that which he has learned "over the years in watching television and in reading documents.", together with having "learned something from this case." (T. 71). He has not performed statistical analyses or testified previously in employment Title VII discrimination cases and knows nothing about IRCA or the Form I-9 employment verification process, except "the little bit that I have learned during this case." (T. 72).

In addition to the foregoing evidence relating to the alleged pattern or practice of document abuse in Count II, respondent has also provided the hearing testimony of Rosario Strano, who testified that on the morning in question Augustin Munoz had provided some 30 additional farm worker applicants who had presented "some asylum papers" which he felt were not valid (T. 30). Munoz, however, felt that those documents were valid. As a result, Strano used the cellular telephone in his truck parked nearby to call the Washington, D.C. office of his law firm and was advised not to hired those applicants. Strano testified that it was his understanding that no one could be hired without providing one of three (3) or four

(4) specific documents, such as a passport, a driver's license, a Social Security card with a driver's license, or a current temporary or permanent resident card (T. 37, 38).

Turning now to that evidence which relates to OSC's allegation in Count III. OSC has alleged in that count that respondent violated the provisions of 8 U.S.C. § 1324b(a)(1)(B) by having engaged in a practice which resulted in unfair immigration-related discrimination resulting from having engaged in a pattern or practice of disparate treatment in the hiring of aliens who were authorized to work in the United States.

OSC's evidence demonstrates that the three (3) remaining charging parties had been improperly required to produce specific INS-issued employment verification documents in order to obtain work at Strano Farms, but that United States citizens could successfully apply for work there by merely and routinely presenting only facially acceptable Form I-9 work eligibility documentation.

Complainant's evidence also discloses that at all times relevant the citizenship status of Pedro Tasej-Cacatzum was that of a work-authorized political asylee applicant, that Mariano Marcos-Francisco was a permanent resident, and that Bernardo Hernandez-Velazquez was a work-authorized temporary resident. Accordingly, all of the remaining three (3) charging parties were "protected individuals" within the definition set forth at 8 U.S.C. § 1324b(a)(3), against whom immigration-related employment citizenship status discrimination is prohibited under the provisions of 8 U.S.C. § 1324b(a)(1)(B).

More specifically, through the testimony of Maria Escobar (T. 65), as well as those facts provided in her February 25, 1993, letter to OSC (Complainant's Exh. 1), complainant has offered evidence that Rosario Strano had told her that only those farm worker applicants possessing permanent resident cards were permitted to work on the morning of February 25, 1993. And as noted earlier, Messrs. Bonilla, Garcia and Jimenez had been required by Rosario Strano to produce an INS-issued document in order to work. In addition, and as mentioned previously, also, Ms. Lisa Levine, OSC's investigator, testified that her examination and analysis of the 242-Forms I-9 copies furnished to her by Strano Farms had resulted in her concluding that only the 193 non-citizen farm worker applicants had been routinely required to produce INS-issued documentation which met Rosario Strano's subjective standards.

Issues

Of the three (3) issues to be addressed, the first is that of evaluating OSC's charge in Count I that Strano Farms violated the provisions of 8 U.S.C. § 1324b(a)(6) by having practiced document abuse against the six (6) original injured parties, including the three (3) remaining charging parties. The allegedly violative conduct consisted of Strano Farms' having required that those individuals produce more and/or different work eligibility documents than those required by law in order to pick tomatoes on field 320 on Thursday, February 25, 1993.

Should OSC prevail on that issue, a civil penalty of not less than $100 and not more than $1,000 may be

ordered for each individual against whom OSC's evidence has disclosed that such document abuse was practiced. 8 U.S.C. § 1324b(g)(2)(B)(iv)(IV). OSC requests that the maximum $1,000 civil money penalty sum be assessed for each violation under this count. In addition, OSC requests that five (5) of the six (6) original charging parties, with the exception of Bernardo Hernandez-Velazquez, be paid back pay, less interim earnings, with interest from February 25, 1993, to the date of this Decision and Order.

The second issue to be considered is that of determining, as OSC has alleged in Count II, whether respondent engaged in a proscribed pattern or practice of document abuse, beyond that which was directed at the six (6) original charging parties involved in Count I, by reason of its having routinely requested that all non-citizen migrant farm worker applicants produce an INS-issued document in order to be considered for employment, in violation of the provisions of 8 U.S.C. § 1324b(a)(6).

In the event that that issue is resolved in favor of OSC, consideration will be extended to complainant's request that Strano Farms be ordered to pay the maximum $1,000 civil money penalty for each individual against whom that violative practice was initiated.

The third and final issue consists of reviewing OSC's charges in Count III namely, that respondent violated the unfair immigration-related discrimination provisions of 8 U.S.C. § 1324b(a)(1)(B) in the course of having conducted a violative pattern or practice of disparate treatment in its hiring process owing to its requirement that only alien farm worker applicants, who were authorized to work in

the United States, provide specific INS-issued documents as a predcondition [sic] for employment, whereas farm worker applicants who held United States citizenship were routinely hired after having merely provided facially acceptable Form I-9 work eligibility documentation.

The civil penalty sums to be assessed for those § 1324b(a)(1)(B) infractions are greater than those provided for document abuse violations. The § 1324b(a)(1)(B) civil penalties range from not less than $250 and not more than $2,000 for each individual against whom such discrimination was practiced. 8 U.S.C. § 1324b(g)(2)(B)(iv)(I).

And unlike the civil penalty sums for individual document abuse as well as document abuse pattern and practice infractions, the civil penalty sums dealing with violations of § 1324b(a)(1)(B), involving unfair immigration-related discrimination, are tiered, so that repeat violations will result in larger civil penalty assessments. For persons or entities involved in a single prior violation that is the subject matter of an order such as this, the civil penalty for each repeat violation ranges from $2,000 to $5,000 and persons or entities involved in more than one such prior violation and order must be assessed a civil penalty of $3,000 to $10,000 for each violation and order. 8 U.S.C. § 1324b(g)(2)(B)(iv)(II), (III).

Because OSC has not offered any evidence to show that Strano Farms has been involved in prior violations of this type which were part of an order of this type, the lowest civil penalty range of $250 to $2,000 will be applied.

Should a finding be entered on that issue in its favor, OSC requests that respondent be ordered to pay the maximum $2,000 civil money penalty for each individual to whom Strano Farms improperly applied this discriminatory policy of disparate treatment in the employment eligibility verification phase of its hiring process.

Discussion, Findings and Conclusions

In support of its document abuse and unfair immigration-related discrimination allegations, complainant relies upon these provisions of IRCA:

> "Unfair Immigration-Related Employment Practices"
>
> Sec. 274B. {8 U.S.C. 1324b} (a) Prohibition of Discrimination Based on National Origin or Citizenship Status. –
>
> (1) General Rule. – It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in Section 274A(h)(3)) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging *of the individual from employment* –
>
> (A) *because of such individual's* national origin, or
>
> (B) in the case of a *protected individual* (as defined in paragraph (3)), because of such individual's *citizenship status.* (emphasis added) * * * *
>
> * * *

(3) Definition of protected individual. – *As used in paragraph (1), the term "protected individual" means an individual who –*

(A) is a citizen or national of the United States, or

(B) *is an alien who is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence under section 210(a),* 210A(a), or 245A(a)(1), is admitted as a refugee under section 207, *or is granted asylum under section 208;* but does not include (i) an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization or, if later, within six months after the date of the enactment of this section and (ii) an alien who has applied on a timely basis, but has not been naturalized as a citizen within 2 years after the date of the application, unless the alien can establish that the alien is actively pursuing naturalization, except that time consumed in the Service's processing the application shall not be counted toward the 2-year period.

* * *

(6) Treatment of Certain Documentary Practices as Employment Practices. – For purposes of paragraph (1), a person's or other entity's request, for purposes of satisfying the requirements of section 274A(b), *for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine* shall be treated as an unfair immigration-related

> employment practice relating to the hiring of individuals.
>
> * * *
>
> (IV) in the case of an unfair immigration-related employment practice described in subsection (a)(6), to pay a civil penalty of not less than $100 and not more than $1,000 for each individual discriminated against; (emphasis added) * * * *

The wording of these pertinent IRCA provisions clearly establishes that OSC has shown that the three (3) remaining charging parties, as work-authorized aliens, or non-citizens, were eligible for work at Strano Farms on February 25, 1993, upon their having presented facially acceptable employment eligibility documentation to Rosario Strano on that date.

In addition, the provisions of 8 U.S.C. §§ 1324a(a)(1) and 1324a(b), provide that any person or entity may not hire any individual without complying with certain employment eligibility verification requirements. Such person or entity must check all documentation presented for the purposes of establishing the applicant's identity and work authorization and must also prepare a Form I-9 within three (3) days of hire.

The preparation of the Form I-9, officially known as the INS Employment Eligibility Verification Form, is a single-page, two-sided document which is utilized by the hiring person or entity to determine the work eligibility of job applicants.

This is accomplished by requiring that all job applicants present documents which establish both their identity and their work eligibility.

By use of the instructions located on the face sheet of the Form I-9, the hiring person or entity is clearly informed of which documents may be used for those purposes, and a description of those documents is set forth in columnar Lists A, B, and C.

List A documents serve the dual purpose of demonstrating the applicant's identity and work eligibility, while the documents listed in List B only establish identity and those in List C simply verify the applicant's work eligibility.

Since December 1, 1986, this system of work eligibility verification has been utilized by all of the nation's employers having four (4) or more employees. Resultingly, literally millions of Forms I-9 have been and are being routinely prepared by countless thousands of hiring persons or entities throughout the nation, utilizing the previously-described preparation information which INS provides to those users on the face sheet of the Form I-9.

Strano Farms, however, as this hearing record demonstrates, has experienced an inordinate measure of difficulty in preparing its Forms I-9. As discussed previously, it paid $100,000 in civil penalties for IRCA violations for similar violations in 1992 and OSC placed into evidence the fact that Strano Farms had inextricably refused to accept INS' offer on that occasion to train its personnel in the proper preparation of its Forms I-9 in order to place

Strano Farms in the position of avoiding the very predicament which it now occupies namely, having been cited once again for IRCA violations arising out of its work eligibility verification practices (Complainant's Exhs. 8, 9).

The choice of documents which a job applicant, without regard to that person's citizenship status, may present to a hiring person or entity in order to establish identity or work eligibility, or both, is exclusively that of the job applicant and not that of the hiring person or entity. At the risk of engaging in an unfair immigration-related employment practice, that of document abuse, the hiring person or entity may not refuse to accept documents which are facially valid nor may they insist, as alleged herein, that a job applicant provide a specific document in order to establish employment eligibility. *U.S. v. A.J. Bart, Inc.*, 3 OCAHO 538 (July 15, 1993).

By the use of these parameters, it can be seen that the three (3) remaining charging parties were eligible for employment at Strano Farms on February 25, 1993, and that on that date, also, all had presented to Rosario Strano work eligibility documents which were entirely acceptable for that purpose. His refusal to accept the proffered documents, as well as his requirement that all provide him with certain INS-issued documents which he felt would satisfy the requirements of IRCA, were obviously violative actions on his part. Accordingly, it is found that complainant has shown by the preponderance of the relevant and credible evidence that Strano Farms violated the document abuse provisions of 8 U.S.C. § 1324b(a)(6) in the manner alleged in Count I.

The civil penalty sum for a § 1324b(a)(6) violation, as noted previously, ranges from the statutorily mandated minimum amount of $100 to the maximum sum of $1,000 for each individual against whom the person or entity has discriminated in that manner. § 1324b(g)(2)(B)(iv)(IV).

OSC's evidence discloses that three (3) violations of individual document abuse have been shown, those which involve the three (3) remaining charging parties.

However, no civil penalty assessments are in order for the other three (3) original charging parties because of their failure to appear at their scheduled depositions during the summer of 1994, because in OSC's opinion, as expressed in its August 19, 1994, motion, they had "shown little or no interest in pursuing the complaint.". In having failed to appear for those scheduled depositions, they have effectively precluded OSC from having offered the supporting evidence required to prove those alleged infractions, also.

The Count II allegations concern the alleged pattern or practice of document abuse violations which Strano Farms directed towards farm worker applicants other than those six (6) involved in Count I. Upon reviewing the evidence which addressed those Count II charges, I also find in favor of OSC for the following reasons.

In charging in Count II that respondent had engaged in a pattern or practice of document abuse, OSC was required to show, again by the preponderance of the evidence, that respondent also violated the provisions of 8 U.S.C. § 1324b(a)(6) by having demanded that all farm worker applicants produce more or different documents than those required by law to demonstrate their work

eligibility and that Strano Farms also refused to honor documents presented by those applicants which on their face reasonably appeared to be genuine.

Complainant successfully carried its evidentiary burden by way of the testimony of its investigator, Ms. Lisa Levine, whose detailed testimony and analysis concerning respondent's preparation of the 242 Forms I-9 at issue has been summarized previously. Strano Farms attempted to dispute her conclusions through the testimony of its expert witness, Dr. Victor Pestien, whose testimony was reviewed earlier, also. Upon comparing those varying testimonial accounts of these disputed facts, and assigning to the witness' conclusions the credibility which their respective testimony and demeanor warrant, I credit the testimony of Ms. Levine over that of Dr. Pestien on this issue.

Even in the event that OSC had not adduced Ms. Levine's expert opinions, the hearing testimony of Messrs. Bonilla, Garcia, and Jimenez, as well as the facts made available in the documentary declarations of Messrs. Jesus Jimenez, Rosa Calderon, and Ovino Calderon, entered into evidence as Complainant's Exhs. 6b, 6c, and 6d, respectively, and all of which were abstracted previously, also, provide more than ample evidence that Strano Farms had in fact engaged in a pattern or practice of document abuse involving at least those six (6) farm worker applicants, and did so over the five (5)-year period from 1988 to 1993.

Having found that respondent engaged in a pattern or practice of document abuse, in violation of the provisions of 8 U.S.C. § 1324b(a)(6), civil penalties must be

assessed, ranging from the statutory minimum of $100 to the maximum sum of $1,000 for each violation.

Complainant's evidence demonstrates that a total of 202 document abuse violations have been shown, based upon the deposition testimony of the remaining three (3) charging parties, as well as the hearing testimony of Messrs. Bonilla, Garcia, and Manuel Jimenez, and on the information furnished by way of the declarations of Messrs. Jesus Jimenez, Rosa Calderon, and Ovino Calderon (Complainant Exhs. 6b, 6c, 6d), as well as the analysis of the 242 Forms I-9 copies furnished to OSC by Strano Farms, in which some 193 non-citizen farm worker applicants, who had been perceived to be aliens, had been improperly requested to furnish specific work eligibility documentation.

In addition to the supportive deposition testimony of the three (3) remaining charging parties on this issue, OSC placed into evidence the February 25, 1993, correspondence of Ms. Maria Escobar, in which she summarized the happenings on or near the tomato field known as 320 earlier that date, together with Rosario Strano's apparently sincere, albeit erroneous, reasoning for having required that all farm worker applicants provide specific INS-issued documentation.

We now examine OSC's allegations, as set forth in Count III, that Strano Farms engaged in acts of unfair immigration-related employment discrimination practices. That conduct was occasioned by respondent's practice of treating work-authorized alien, or non-citizen, farm worker applicants differently, or disparately, than their United States citizen counterparts based upon

Strano Farms' policy, as effectuated by Rosario Strano, one of its partners, that because those applicants were aliens, they could only be hired if they presented only those specific INS-issued documents which Strano had improperly demanded of all farm worker applicants in the pre-employment documentation process. For the following reasons, I find in favor of OSC on this concluding issue, also.

The prior detailed summary of evidence relating to OSC's discrimination allegations in Count III reveals that the three (3) remaining charging parties, although aliens, were clearly work-authorized and had presented facially acceptable work eligibility documents to Strano on February 25, 1993. In having done so, they furnished sufficient documentation to have been hired and, in having refused to hire them because of his erroneous opinions about the efficacy of those documents, Strano, acting on behalf of the respondent partnership, committed a classic example of an unfair immigration-related discrimination practice which violates the provisions of 8 U.S.C. § 1324b(a)(1)(B).

OSC's evidence has disclosed that there were 202 violations of this type, also. Besides those of the three (3) remaining charging parties, there were also 193 non-citizen farm worker applicants against whom it has been shown that Strano Farms had similarly discriminated, as discussed previously in the analysis of the 242 Forms I-9 furnished to OSC. In addition, the three (3) former Strano Farms workers who testified at the hearing and the three (3) other former employees whose sworn declarations were received in evidence were also discriminated against in a manner proscribed under the provisions of 8 U.S.C. § 1324b(a)(1)(B).

As was the case concerning its evidence addressed to the allegations in Counts I and II, OSC has more than amply provided a preponderance of credible and reliable evidence in support of its unfair immigration-related discrimination charges in Count III.

Having found that Strano Farms violated the provisions of IRCA in the manners alleged in Counts I, II, and III, consideration will now be given to those remedies being sought by OSC, as well as the civil penalty sums, totalling upwards to $617,000, which it has requested. In addition, OSC requests back pay sums, together with interest, where appropriate.

It might be well to summarize the remedies which OSC feels are in order under these facts:

1. Pay Mr. Pedro Tasej-Cacatzum back pay less interim earnings, together with interest and other benefits;

2. Pay Mr. Marcos-Francisco back pay less interim earnings, together with interest and other benefits;

3. Pay Mr. Pascual Tasej-Cacatzum back pay less interim earnings, together with interest and other benefits;

4. Pay Mr. Lucas Pascual Lucas back pay less interim earnings, together with interest and other benefits;

5. Pay Mr. Mario Miguel Mendez back pay less interim earnings, together with interest and other benefits;

6. Pay a $1,000 civil penalty for each person listed in above paragraphs (1) through (5);

7. Pay a $1,000 civil penalty for Messrs. Hernandez-Velazquez, Bonilla, Manuel Jimenez, Jesus Jimenez, Garcia, Rosa Caldero, and Ovino Caldero;

8. Pay a $1,000 civil penalty for each person in the group of 193 aliens who submitted I-9s to Strano Farms, who file claim forms and who this Court determines were subject to document abuse and/or citizenship status;

9. For a period of three years, order Strano Farms to pay for ten "drive time" (6:00 to 9:00 a.m.; 4:00 to 7:00 p.m. weekdays) announcements per month on a local Spanish-speaking radio station during the growing season (December through April) informing individuals that if they believe they were victims of document abuse discrimination by Strano Farms to contact the Office of Special Counsel to file a claim. All claimants who establish that they were available for employment with Strano Farms during the period 1988 to 1994 would be entitled to a presumption of eligibility for purposes of back pay and a civil penalty;

10. Pursuant to the claims procedure identified in paragraph (7), *supra,* pay each individual found to have been a victim of Strano Farms' pattern or practice of document abuse during the three year period, back pay less interim earnings;

11. Pay a civil penalty of $1,000 for each instance of document abuse established through the proposed claims procedure;

12. Any other remedies the ALJ deems appropriate in this case, including requirements to educate personnel or report periodically to the ALJ;

13. Back pay for the first remaining charging party, Pedro Tasej-Cacatzum, in the amount of $60 to $72 daily, or $300 to $360 weekly for 47 days, or a gross salary loss of $2,820 to $3,384, plus interest at the rates of 7 to 9 percent from February 25, 1993 to the date of this Decision and Order;

14. Back pay for the second remaining charging party, Mariano Marcos-Francisco, in the amount of $2,820, with interest at the same varying rates utilized by the Internal Revenue Service for use in setting the short-term rate for underpayment of taxes, from February 25, 1993, to the date of this Decision and Order; and

15. In summary, that Strano Farms be ordered to pay the sum of $3,000, or the maximum civil penalty of $1,000 to each of the three (3) remaining charging parties, against whom it practiced document abuse; that Strano Farms be ordered to pay the sum of $202,000, or the maximum civil penalty of $1,000 to each of the following groups of 202 persons upon whom it practiced a pattern or practice of document abuse, the three (3) remaining charging parties, to each of the three (3) original charging parties who were dismissed following their failure to appear for depositions in this proceeding, the three (3) former employees of Strano Farms who testified at the hearing, and the three (3) former Strano Farms employees whose sworn declarations were placed into evidence by OSC; and civil penalty sums of undetermined amounts

resulting from Strano Farms' pattern and practice of citizenship status discrimination involving the three (3) remaining charging parties and over 202 other individuals, ranging from $250 to $2,000 per violation, or a total civil penalty of some $51,250 to $410,000 for the violations alleged in Count III.

It can be seen that OSC seeks to impose civil penalties totalling $6,000 in Count I, $193,000 in Count II, and between $51,250 and $410,000 in Count III, plus back pay for two (2) of the three (3) original charging parties totalling between $5,640 and $6,204, with interest at the average rate of 8 per-cent from February 25, 1993, to the date of this Decision and Order.

The appropriate total civil penalty being assessed to the three (3) violations which OSC has proven in Count I is $750, or $250 for each of the three (3) document abuse violations involving the three (3) remaining charging parties.

OSC has not demonstrated by the required preponderance of the evidence that document abuse had been practiced upon the other three (3) original charging parties, Messrs. Pascual Tasej-Cacatzum, Lucas Pascual Lucas, and Mario Miguel Mendez. That because OSC advised on August 19, 1994, that they had "failed to appear for depositions scheduled by the United States and have shown little or no interest in pursuing the complaint". In the absence of having secured their deposition testimony, OSC was forced to present evidence of only three (3) violations, those which involve the remaining three (3) charging parties, who also received subpoenas and appeared for their depositions, as ordered.

In Count II, the appropriate civil penalty for the 202 proven pattern and practice document abuse infractions is $50,500, or $250 for each of those 202 violations.

And the appropriate civil penalty sum to be assessed for each of the 202 unfair immigration-related discrimination violations in Count III is $250, or a total civil penalty sum of $50,500 for that count.

In addition, to the civil penalty amounts in Counts I, II, and III, which total $101,750, Strano Farms' total liability for back pay and interest for the 25-month period between February 25, 1993 and the date of this Decision and Order is $6,919, computed in the following manner.

The total back pay sum due Pedro Tasej-Cacatzum is $3,619, or $66 daily, or .40 per bucket for the 165 buckets of tomatoes he testified that he picks in a workday, multiplied by 47 work days, or $3,102, plus $517 interest, computed at the average rate of 8-percent annual interest for the 25-month period commencing on February 25, 1993, to the date of this Decision and Order.

In the case of the only other of the three (3) remaining charging parties for whom OSC is seeking back pay, Mariano Marcos-Francisco, the total back pay sum is $3,300, or .40 per bucket for the 150 buckets of tomatoes which he stated that he picks in a workday, multiplied by 47 days, or $2,820, plus $480 interest, figured at the average annual interest rate of 8-percent for the 25-month period commencing February 25, 1993, and the date of this Decision and Order.

In its post-hearing brief, OSC has advised that it seeks no award of back pay on behalf of one of the three

(3) remaining charging parties, Bernardo Hernandez-Velazquez, since it was subsequently determined that he had presented an expired INS-issued document on February 25, 1993.

Before addressing the provisions which will be included in the order to be entered in this proceeding, other matters covered in OSC's post-hearing brief merit attention.

OSC, as noted previously, has requested that Strano Farms be ordered to pay for 10 "drive time" announcements each month during the December thru April growing season on a local Spanish-speaking radio station in the Homestead, Florida area in order to alert those individuals upon whom Strano Farms may also have practiced document abuse between 1988 and 1994. In that manner, OSC wishes to have those individuals file claims against Strano Farms, also.

These time-specific and season-targeted radio announcements would air between 6 am and 9 am and 4 pm to 7 pm daily and OSC has also furnished, for the benefit of Strano Farms apparently, a specimen 113-word message, which also provides a toll-free "800" telephone number for the use of responding persons.

As authority for that request, OSC invites to my attention the August 12, 1992, ruling of the United States District Court in *United States v. City of Warren, Michigan*, 61 Empl. Prac. Dec. (CCH) ¶ 42,269 (E.D. Mich. 1992), involving a disparate impact case under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. concerning pre-October 1986 recruitment practices for police and firefighter positions, among others, by that defendant

municipality. In issuing that ruling, U.S. District Court Judge Duggan utilized the injunctive relief provisions of Title VII to effectuate the appropriate release.

OSC's reliance upon that ruling to support its request that "drive time" radio announcements be ordered herein is misplaced since IRCA contains no parallel provisions to those found in Title VII, at 42 U.S.C. § 2000e-5(g). As OSC has pointed out elsewhere in its post-hearing brief, the parameters for the contents of an order of an administrative law judge finding violations under 8 U.S.C. § 1324b(g)(2)(A) simply do not contain any authority, either express or implied, which would accommodate that request for equitable relief. That because Congress, in enacting IRCA, decided that its provisions could be enforced without providing this Office with the broad equitable powers contained in the Title VII provisions.

OSC has also submitted other novel and unique requests in its brief namely, that the personnel of Strano Farms be required to report periodically to this administrative law judge on its obligation to educate its personnel on proper Form I-9 preparation procedures, and secondly, that I also "order the implementation of a claims procedure that will be carried out over several years.".

It might be well, in view of those requests, to examine the role of the undersigned in this matter. It is that, as expressed in the provisions of 8 U.S.C. § 1324a(e)(3)(B), of conducting a hearing "in accordance with the requirements of section 554 of Title 5, United States Code" and to enter findings of fact and issue appropriate orders in the manner prescribed.

Since there is no statutory authority which would allow an administrative law judge to implement the ongoing claims filing procedure and/or oversight role which OSC has quite gratuitously extended, those requests must and are also being firmly denied.

Order

Having found that Strano Farms has violated the document abuse provisions of 8 U.S.C. § 1324b(a)(6) in the manners alleged in Counts I and II, as well as the immigration-related employment discrimination provisions of 8 U.S.C. § 1324b(a)(1), in the manner alleged in Count III, it is hereby ordered that Strano Farms cease and desist from further violations of U.S.C. §§ 1324b(a)(1)(B) and 1324b(a)(6).

It is further ordered that Strano Farms pay the sum of $101,750 as the total civil penalty amounts for the 407 violations contained in Counts I, II, and III and respondent is further ordered to pay back pay amounts, including interest, totally $6,919, or a total amount of $108,669, allocated in the following manner.

In Count I, Strano Farms is ordered to pay civil penalty sums of $250 for each of the three (3) proven violations or, a total civil penalty of $750 on that count.

In addition, respondent is ordered to pay Pedro Tasej-Cacatzum the sum of $3,619, representing a back pay award of $3,102, plus $517 in interest, computed at the average rate of 8-percent annual interest for the 25-month period beginning on February 25, 1993, to the date of this Decision and Order.

Strano Farms is also ordered to pay to Mariano Marcos-Francisco the total sum of $3,300, which represents the amount of $2,820 in back pay plus $480 in interest for the same 25-month period, figured at an average annual rate of 8-percent.

In Count II, Strano Farms is ordered to pay civil penalty sums of $250 for each of the 202 violations found, or a total civil penalty of $50,500 on that count.

In Count III, Strano Farms is also ordered to pay civil penalty sums of $250 for each of the 202 violations which have been proven, or a total civil penalty of $50,500 on that count.

/s/ Joseph E. McGuire
Joseph E. McGuire
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order seeks a timely review of this Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of this Order.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 1995, I have served copies of the foregoing Decision and Order to the following persons at the addresses shown, in the manner indicated:

Office of the Chief Administrative Hearing Officer
Skyline Tower Building
5107 Leesburg Pike, Suite 2519
Falls Church, Virginia 22041
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P.O. Box 27728
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Homestead, Florida 33030
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/s/ Cathleen L. Lascari
Cathleen L. Lascari
Legal Technician to
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Administrative Law Judge
Department of Justice
Office of the Chief Administrative
Hearing Officer
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Falls Church, Virginia 22041
(703) 305-1043

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-4654

ROSARIO STRANO,
VITO STRANO dba STRANO FARMS,

Petitioners,

versus

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW,
OFFICE OF CHIEF ADMINISTRATIVE HEARING
OFFICER, PEDRO TASEJ-CACATZUM,
MARIANO MARCOS-FRANCISCO,
BERNARDO HERNANDEZ-VELASQUES,

Respondents.

On Appeal from the United States District Court for the Southern District of Florida

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(Filed Dec. 18, 1996)

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__,
_____F.2d_____).

Before: HATCHETT, Chief Judge, DUBINA, Circuit Judge and COHILL*, Senior Circuit Judge.

---

* Honorable Maurice B. Cohill, Jr., Senior U. S. District Judge for the Western District of Pennsylvania, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE 11TH CIRCUIT

CASE NO. 95-4654

ROSARIO STRANO AND VITO STRANO d/b/a STRANO FARMS,

Petitioners,

vs.

UNITED STATES DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, OFFICE OF CHIEF ADMINISTRATIVE HEARING OFFICER, PEDRO TASEJ-CACATZUM, BERNARDO HERNANDEZ-VELAZQUES, AND MARIANO MARCOS-FRANCISCO,

Respondents.

_____ /

PETITIONERS' SUGGESTION FOR REHEARING *EN BANC*

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE

Rose Briceno

P.T. Cacatzum

Bernardo Hernandez-Velasquez

William Ho-Gonzalez

Robert M. Hustead

Administrative Law Judge Joseph Mcguire

Mariano Marcos-Francisco

Leslie A. Simon

Anita Stevens

Rosario Strano

Vito Strano

CERTIFICATE OF COUNSEL

I express a belief, based on reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

Chauffeurs, Teamsters & Helpers, Local 391 v. Terry, 494 U.S. 558 (1990).

Granfinanciera v. Nordberg, 492 U.S. 33 (1989).

Additionally, I express a belief based on reasoned and studied professional judgment that this appeal involves a question of exceptional importance, to wit:

Whether Congress has the power to assign to a tribunal which does not use juries as fact finders a dispute involving the award of lost wages from one private person to another?

/s/ Robert M. Hustead
Robert M. Hustead, Esq.
Attorney of Record for
Rosario Strano and
Vito Strano d/b/a Strano Farms

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STATEMENT OF ISSUES

Whether the Office of Chief Administrative Hearing Officer, an administrative tribunal that does not conduct jury trials, may order a private employer to pay damages in the form of back pay to a private individual as purportedly authorized by 8 *U.S.C.* §1324b(g)(2)(B)(iii).

STATEMENT OF FACTS

As reflected in the Statement of Issues, the issue is one of pure law that does not depend on evidentiary facts.

COURSE OF PROCEEDINGS

On October 6, 1993, there was filed against petitioners an administrative complaint by the special counsel for unfair immigration related employment practices. The complaint alleged that respondents had discriminated against six named individuals by denying them employment because they failed to present particular I.N.S. issued documents allegedly demanded of them by respondents, in violation of 8 *U.S.C.* §1324b. R. 1627. The relief requested included civil money penalties for the government and back pay for the six named complainants. *Id.* Due to the presence of the back pay claims, respondents claimed a right to jury trial and demanded jury trial in writing. R. 1579. This demand was stricken by the tribunal *sua sponte.* R. 1546. Three of the complainants were eventually dropped as parties for non-cooperation on discovery. R. 1465, 1441. The matter was heard September 15 and September 16, 1994. An order was entered on March 28, 1995, which, *inter alia,* awarded back pay to two of the three complaining parties. R. 0025. The back pay request for one of those three was withdrawn since he had presented an expired work authorization document and was thus not entitled to work. R. 0023. Nonetheless, the respondents were fined for not hiring this individual (R. 0017; 0022), a decision which was upheld by the panel.

Petition for review was filed May 22, 1995, within the 60 days provided by 8 *U.S.C.* §1324b(i)(1). The jury issue was briefed. Oral argument was had on September 10, 1996. The panel affirmed, without opinion.

ARGUMENT

In *Chauffeurs, Teamsters and Helpers v. Terry*, 494 U.S. 558 (1990), the Court characterized the issue and result as follows:

> This case presents the question whether an employee who seeks relief in the form of back-pay for a union's alleged breach of its duty of fair representation has a right to trial by jury. We hold that the Seventh Amendment entitles such a plaintiff to a jury trial.

494 U.S. at 561. In *Terry*, as here, the cause of action was entirely statutory, that in *Terry* arising under the *N.L.R.A.*, 29 *U.S.C.* §159(a). The issue under the Seventh Amendment is whether, at common law, the rights being adjudicated would be legal or equitable in nature (*id.* at 564), for which the analysis is:

> To determine whether a particular action will resolve legal rights, we examine both the nature of the issues involved and the remedy sought. "First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature." *Tull, supra*, at 417-418 (citations omitted). The second inquiry is the more important in our analysis. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989).

(*id.* at 565). It is the nature of the issue claimed to merit jury trial, not the nature of the "overall action", which determines the right to jury. *Id.* at 569; *Ross v. Bernhard,* 396 U.S. 531 (1970).

On the first criterion under *Terry,* the action at bar is most analogous to one for breach of contract. The complaining parties had been recruited by a farm labor contractor to pick tomatoes in the Stranos' field. R. 0005. Mr. Strano was found to have refused to allow the complainants to perform the work for which they had been hired for reasons which are illegal under 8 *U.S.C.* §1324b(a)(6). This could not be more analogous to a breach of contract case at common law; one of the terms of the contract, albeit one dictated by statute, was violated, resulting in lost wages.

As for the second *Terry* factor, the nature of the remedy, it is the more important factor. *Granfinanciera v. Nordberg,* 492 U.S. 33, 42 (1989). In this case, and any case under 8 *U.S.C.* §1324b, the parties plaintiff include both the government and the individual claimants for whom government counsel is acting as counsel as well. 8 *U.S.C.* §1324b(e)(3) provides:

> Any person filing a charge with the Special Counsel respecting an unfair immigration-related employment practice *shall be considered a party to any complaint before an administrative law judge* respecting such practice and any subsequent appeal respecting that complaint. In the discretion of the judge conducting the hearing, any other person may be allowed to intervene in the proceeding and to present testimony.

The relief statutorily authorized for the complaining parties is an order "to hire individuals directly and adversely affected, with or without back pay". 8 *U.S.C.* §1324b(g)(2)(B)(iii). Compensatory damages for back pay or otherwise, was "the traditional form of relief offered in the courts of law". 494 U.S. at 570. As in *Terry,* the money sought by the complainants is not a *res* perhaps subject to equitable disgorgement, but for wages they would have received had they not been prohibited from working. The court found the back pay relief sought in *Terry* to be legal in nature, for which the Seventh Amendment requires jury trial. *Id.* at 573. The former Fifth Circuit held over 30 years ago that a suit brought by the Secretary of Labor, or by an employee, seeking to recover back pay (unpaid wages and overtime) under the Fair Labor Standards Act was a common law debt or assumpsit action and required jury trial. *Wirtz v. Jones,* 340 F.2d 901, 904 (5th Cir. 1965); *Lewis v. Times Publishing,* 185 F.2d 457 (5th Cir. 1950). The case at bar cannot be rationally distinguished from *Terry, Wirtz,* or *Lewis.*

The government contended that the administrative action involved public rights, not private rights, removing the case from the ambit of jury trial. This issue was authoritatively treated in *Granfinanciera v. Nordberg,* 492 U.S. 33 (1989). *Granfinanciera* involved the question whether a defendant in a bankruptcy court fraudulent transfer case was entitled to jury trial under the Seventh Amendment. The bankruptcy judge had ruled that fraudulent transfers, at common law, were equitable and non jury actions at common law. The district court affirmed. This court likewise affirmed on the grounds, as summarized by the Supreme Court, that (i) the bankruptcy code

doesn't purport to allow jury trial in bankruptcy proceedings; (ii) bankruptcy cases are equitable in nature and thus fraudulent transfer proceedings in bankruptcy are inherently equitable even if money damages are in issue; and (iii) Congress may convert a legal right into an equitable one and thus displace the Seventh Amendment. 492 U.S. at 37. The Supreme Court held that an action for a determinate sum of money in a fraudulent transfer action in late 18th century England would have been brought at law, not in equity. *Id.* at 46-7. The Court also held that the prayer for money judgment would preclude invoking equity under the common law. *Id.* at 47-8. In *Granfinanciera* there were two assertions made to avoid the sweep of the Seventh Amendment, first that "public rights" were involved and second that requiring jury in bankruptcy would disrupt Congress' statutory scheme. The answers to these claims were that fraudulent transfer actions in bankruptcy involved "private rights" as previously defined in *Crowell v. Benson,* 285 U.S. 22 (1932): "Private right . . . is . . . the liability of one individual to another under the law as defined". *Granfinanciera* at f.n. 8. The Court concluded this point by saying "unless a legal cause of action involves public rights, Congress may not deprive parties litigating over such a right of the Seventh Amendment's guarantee to a jury trial". 492 U.S. at 53. Given that a bankruptcy trustee's suit would seek to recover money for distribution to a wider creditor body, there was at least the whisper of an argument that public rights were involved. However the fact that the proceeds of the fraudulent transfer action might, distributed under the bankruptcy hierarchical scheme, impact public rights couldn't change the fraudulent transfer suit into one

involving "public rights". *Granfinanciera* at f.n. 11, 12. At bar, Congress' attempt to allow an administrative tribunal to order a private individual to pay money damages directly to another private individual, with such damages measured by common law contract principles is an unconstitutional assignment of forum for adjudicating such private rights to common law damages.

As for the impact on the underlying adjudicatory scheme, the Court held that Congress has no power to reclassify private legal rights as equitable and assign them to administrative agencies or specialized courts. 492 U.S. at 61. Thus, the impact of not allowing Congress to do so is not material to the Seventh Amendment issue.

CONCLUSION

The panel decision is inconsistent with Supreme Court precedent and that of the former Fifth Circuit. While no opinion was written or published, the parties are entitled to consistency and predictability in the law. The panel might have felt bound by cases such as *Johnson v. Georgia Highway Express*, 417 F.2d 1122 (5th Cir. 1969) to hold that back pay is equitable relief. *Johnson* so holds under Title VII and it would take the *en banc* court to change that result. We note, however, that this is not a Title VII case and *Johnson* does not control. The decision in this case must be informed by the Supreme Court's recent Seventh Amendment case law, not *Johnson* to the extent that *Johnson* is inconsistent.

Accordingly, the panel decision should be vacated, along with the administrative order, and the case remanded.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by first class mail this 7th day of November, 1996, on: Leslie A. Simon, Esq., U.S. Department of Justice, Civil Rights Division, Appellate Section, P.O. Box 66078, Washington, D.C. 20035-6078.

Respectfully submitted,

ROBERT M. HUSTEAD, P.A.
Attorneys for Petitioners
70 Northwest 8th Street
Homestead, Fl. 33030
Tel. (305) 246-3319
/s/ Robert M. Hustead
Robert M. Hustead
Florida Bar No. 199966

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW OFFICE OF THE CHIEF
ADMINISTRATIVE HEARING OFFICER

IN RE CHARGES OF) **P. CACATZUM, P.T. CACATZUM,**) **M. FRANCISCO, M. MENDEZ,**) **B. VELAZQUEZ &**) **L. PASCUAL**)	8 U.S.C. § 1324b PROCEEDING
UNITED STATES OF AMERICA,) COMPLAINANT)	OCAHO Case No. 93B00182
v.)	
ROSARIO STRANO &) **VITO STRANO, d/b/a**) **STRANO FARMS.**) RESPONDENT.)	

COMPLAINT REGARDING
UNFAIR IMMIGRATION
RELATED EMPLOYMENT PRACTICES

COMPLAINANT, the United States of America, alleges as follows:

1. This action is brought by the Special Counsel for Immigration Related Unfair Employment Practices ("Special Counsel") to enforce the provisions of 8 U.S.C. § 1324b.

2. This suit arises out of Respondent's request for a specific document from P. Cacatzum, P.T. Cacatzum, M. Francisco, M. Mendez, B. Velazquez and L. Pascual ("Injured Parties") to prove their employment eligibility in violation of 8 U.S.C. § 1324b(a)(6); Respondent's

refusal to honor the INS-issued documents presented by the Injured Parties that on their face reasonably appear to be genuine in violation of 8 U.S.C. § 1324b(a)(6); Respondent's pattern and practice of requesting specific documents to complete the Form I-9 in violation of 8 U.S.C. § 1324b(a)(6); and Respondent's pattern and practice of discriminatory and disparate treatment of aliens in the hiring process in violation of 8 U.S.C. § 1324b(a)(1).

JURISDICTION

3. Jurisdiction of the Office of the Chief Administrative Hearing Officer is invoked pursuant to 8 U.S.C. § 1324b(e).

PARTIES

4. The Special Counsel is charged with investigating and prosecuting charges of unfair immigration related employment practices. 8 U.S.C. § 1324b(c)(2).

5. Mr. M. Francisco is a permanent resident, Mr. B. Velazquez is a temporary resident. At all times relevant to this proceeding, they were "protected individuals", as defined by 8 U.S.C. § 1324b(a)(3), and aliens authorized to work in the United States. Mr. L. Pascual, Mr. P. Cacatzum, Mr. P.T. Cacatzum, and Mr. M. Mendez are political asylee applicants and at all times relevant to this proceeding were aliens authorized to work in the United States.

6. Respondent is a partnership whose principal place of business is in Florida City, Florida. Respondent

employed more than three employees on the date of the alleged discriminatory acts, and continues to do so today.

STATEMENT OF FACTS

7. The acts described below occurred at Respondent's farm in Homestead, Florida.

8. On February 25, 1993, the Injured Parties went to Respondent's farm in Homestead, Florida seeking employment as field workers.

9. As part of the hiring process, Respondent requested that the Injured Parties present their INS-issued documents to prove their employment eligibility. This request was done in accordance with Respondent's standard operating procedure.

10. The Injured Parties produced their unexpired INS-issued employment documents.

11. Upon review of these documents Respondent rejected the Injured Parties' INS-issued documents, stating that they had expired, and refused to hire the Injured Parties.

12. Respondent's standard operating procedure is to request the production of INS-issued documents from all alien applicants for employment verification.

13. On March 10, 1993, the Injured Parties filed charges of discrimination against Respondent with the Special Counsel. (Attachment 1).

COUNT I

UNFAIR DOCUMENT ABUSE PRACTICE PRACTICE AGAINST THE INJURED PARTIES

14. Complainant incorporates by reference the allegations set forth in paragraphs 1 through 13 above as if fully set forth herein.

15. On February 25, 1993, Respondent requested that the Injured Parties, individuals authorized to work in the United States, produce their INS-issued employment documents for employment verification purposes.

16. The Injured Parties produced their unexpired INS-issued documents.

17. Upon examination of these documents, Mr. Rosario Strano, on behalf of Respondent, refused to honor the Injured Parties' documents, stating they had expired, and refused to hire the Injured Parties.

18. Respondent's actions violated 8 U.S.C. § 1324b(a)(6) and constitute an unfair immigration related employment practice against the Injured Parties in that Respondent requested more and/or different documents than are required for Form I-9 employment verification and refused to honor documents tendered that on their face appeared to be genuine.

COUNT II

PATTERN OR PRACTICE OF DOCUMENT ABUSE IN VIOLATION OF 8 U.S.C. § 1324b(a)(6)

19. Complainant incorporates by reference the allegations set forth in paragraphs 1 through 13 above as if fully set forth herein.

20. Respondent's standard operating procedure during the hiring process is to demand that all aliens produce an INS-issued document.

21. This request is made for purposes of satisfying the Employment Verification Form I-9.

22. Respondent's pattern and practice of refusing to honor documents tendered that on their face appear to be genuine, and of demanding the production of more and/or different documents than are required for Form I-9 employment verification, directly and adversely affects the rights of all work-authorized individuals, and is an unfair employment practice which violates 8 U.S.C. § 1324b(a)(6).

COUNT III

PATTERN AND PRACTICE OF DISPARATE TREATMENT WITH RESPECT TO HIRING ALIENS AUTHORIZED TO WORK IN THE UNITED STATES

23. Complainant incorporates by reference the allegation set forth in paragraphs 1 through 13 above as if fully set forth herein.

24. Respondent's standard operating procedure when interviewing and hiring applicants is to disparately treat individuals based upon their citizenship status.

25. If the individual is an alien, the individual is required to produce an acceptable, as defined by the Respondent, INS-issued document before the individual will be hired.

26. In contrast, U.S. citizens are hired by the Respondent upon the presentation of any valid combination of I-9 documents.

27. Respondent's pattern and practice of disparately treating individuals on the basis of their citizenship status directly and adversely affects the rights of all protected individuals, and is an unfair employment practice which violates 8 U.S.C. § 1324b(a)(1)(B).

WHEREFORE, Complainant respectfully prays:

A. That the Office of the Chief Administrative Hearing Officer assign an Administrative Law Judge to preside at a hearing on this matter as soon as practicable;

B. That the Administrative Law Judge grant the following relief:

1. Order Respondent to cease and desist from the alleged discriminatory practices;

2. Order Respondent to comply with the requirements of 8 U.S.C. § 1324a(b) with respect to individuals hired for a period of three years from the date of this order;

3. Order Respondent to retain for a period of three years, the names and addresses of each individual who applies, in person or in writing, for work with Respondent;

4. Order Respondent to educate its personnel concerning their responsibilities under Section 8 U.S.C. §§ 1324a(b) and 1324b(a);

5. Order Respondent to pay civil penalties in the following amounts: $1,000 for Count I; $1,000 for Count II; $2,000 for each individual to whom Respondent applied the policy described in Count III;

6. Order Respondent to pay the Injured Parties full back pay, with interest;

7. Order such additional relief as justice may require, including Complainant's costs in bringing this action.

Dated: October 5th, 1993

Respectfully submitted,

/s/ William Ho-Gonzalez
William Ho-Gonzalez
Special Counsel

/s/ Rose A. Briceno
Rose A. Briceno
Trial Attorney
Office of Special Counsel
For Immigration Related
Unfair Employment Practices
Post Office Box 27728
Washington, D.C. 20038-7728
(202) 616-5580

Departamento de Justicia
de los Estados Unidos
Oficina del Consejero Especial

Formulario para denunciar prácticas injustas de empleo relacionadas con la condición de inmigrante

Instrucciones

Este formulario sólo debe usarse para denuncias que alegan una práctica injusta de empleo relacionada con la condición de inmigrante en contravención del Código de los EE.UU., Título 8 § 1324b. Este formulario debe presentarse ante la Oficina del Consejero Especial ("Office of Special Counsel") para Prácticas Injustas de Empleo Relacionadas con la Condición de Inmigrante.

U.S. Department of Justice
Office of Special Counsel
P.O. Box 65490
Washington, D.C. 20035-5490

OFFICE OF SPECIAL COUNSEL (I.R. DEP.)
93 MAR 10 PM 2:06

En el formulario, "Parte Perjudicada" es la persona que alega haber sido desfavorecida directamente por una práctica injusta de empleo relacionada con su condición de inmigrante o la persona supuestamente desfavorecida cuando la denuncia es presentada por un funcionario del Servicio de Inmigración y Naturalización o por un denunciante que no sea la Parte Perjudicada.

En este formulario, "Parte Denunciante" es: 1) la persona que presenta la queja ante el Consejero Especial alegando haber sido perjudicada directamente por una práctica injusta de empleo relacionada con su condición de inmigrante, o 2) la persona o empresa privada autorizada por una persona para presentar una queja ante el Consejero Especial alegando que la persona fue perjudicada directamente por una práctica injusta de empleo debido a su condición de inmigrante, o 3) un funcionario del Servicio de Inmigración y Naturalización que presenta una queja ante el Consejero Especial alegando que hubo una práctica injusta relacionada con la condición de inmigrante.

La "Parte Denunciante" deberá llenar toda la información solicitada en el formulario de denuncia escribiendo a máquina o con letra de imprenta. Preguntas no pertinentes deben dejarse en blanco.

Este formulario de denuncia deberá entregarse o enviarse por correo a la Oficina del Consejero Especial dentro de los 180 días de que ocurrió la supuesta discriminación.

Las preguntas sobre este formulario deberán dirigirse a la Oficina del Consejero Especial escribiendo a la dirección arriba mencionada o llamando al teléfono (202)653-8121 ó 1-800-255-7688 (llamada gratuita) y para las personas con incapacidad auditiva al (202)296-0168 ó 1-800-237-2515 (llamada gratuita).

1. Parte Denunciante

Nombre y Apellido:		Teléfono:
Mariano MARCOS-FRANCISCO		( ) NA
Otros nombres utilizados:		
NA		
Dirección: Calle:		
P.O. BOX 294		
Ciudad:	**Estado:**	**Código Postal (ZIP):**
PALMETTO	FL	34221

Parte Perjudicada (Si la PARTE PERJUDICADA y la PARTE DENUNCIANTE son la misma persona, escriba "la misma")

Nombre y Apellido:		Teléfono
SAME		( )
Otros nombres utilizados:		
Dirección: Calle:		
Ciudad:	**Estado:**	**Código Postal (ZIP):**

2. Persona, empresa o entidad que, en su opinión, ha discriminado injustamente en el empleo

Nombre y Apellido:		Teléfono (si lo sabe):
ROSIE STRANO/ STRANO FARMS		305) 247-2362
Dirección: Calle:		
75 W. Palm Drive		
Ciudad:	**Estado:**	**Código Postal (ZIP):**
Florida City	FL	33034

FORM OSC-IA
APR. 92

3. **La persona, empresa o entidad tiene** (marque una casilla):

☐ Menos de 15 empleados pero más de 3.

☐ 15 empleados o más.

☒ No puedo calcular el número de empleados.

4. **La Parte Perjudicada fue víctima de discriminación en el empleo debido a (marque las casillas pertinentes):**

☐ Discriminación por el origen nacional (en cuanto a la contratación, reclutamiento o referencia, o al despido de la Parte Perjudicada)

☐ Discriminación por la ciudanía (en cuanto a la contratación, reclutamiento o referencia, o al despido de la Parte Perjudicada)

☐ Represalias por hacer valer los derechos protegidos por la §1324 del Título 8 del Código de los Estados Unidos

☒ Uso indebido de documentos (la persona, empresa o entidad se negó a aceptar un documento válido o exigió otros o más documentos de los necesarios para llenar el Formulario I-9 del INS)

5. **La Parte Perjudicada es:**

☐ Cuidadano o nacional de los Estados Unidos (si marca esta casilla, pase al renglón 6)

☒ Extranjero con permiso para trabajar en los Estados Unidos (si marca esta casilla, debe completar el resto del renglón 5)

Si la PARTE PERJUDICADA es un extranjero autorizado para trabajar en los Estados Unidos:

No.(s) del Registro de Extranjeros: A091902873

Fecha de nacimiento: 24 (día) 09 (mes) 66 (año)

Si la PARTE PERJUDICADA es un extranjero autorizado para trabajar en los Estados Unidos:

Parte Perjudicada (marque sólo si la casilla es pertinente):

☒ Fue admitida legalmente como residente permanente
Fecha en la que se la concedió la residencia: 01/26/89

☐ Es extranjero/a admitido/a legalmente como residente provisional conforme a las §1160(a) ó 1255a(a)(l) del Título 8 del Código de los Estados Unidos

☐ Fue admitida como refugiado/a conforme a la §1157 del Título 8 del Código de los Estados Unidos

☐ Se le concedió asilo conforme a la §1158 del Título 8 del Código de los Estados Unidos

☐ Tiene otra autorización para trabajar

Parte Perjudicada (marque una casilla):

☐ solicitó la naturalización
fecha en que presentó la solicitud: _____

☒ no solicitó la naturalización

6. **¿Cuándo ocurrió la práctica injusta? (fecha)** 2/25/93

7. **¿Dónde ocurrió la práctica injusta? (lugar)** Rosie Strano's tomatoe field on N. Krome Ave., Homestea Florida (pertaining to Strano Farms)

8. **¿Ha presentado una queja basada en esta serie de hechos ante la Comisión para Igualdad de Oportunidades de Empleo (EEOC o cualquier otra agencia gubernamental?**

☐ Sí

☒ No

En caso afirmativo, ¿en qué oficina? _____

Dirección: _____

Ciudad: _____ Estado: _____ Código Postal: _____

Fecha en que la presentó: _____ No. del registro (si lo sabe): _____

9. **Describa la práctica injusta de empleo** (utilice hojas adicionales si es necesario)

Fuí con el contratista, Agustin Perez, al "field". Estabamos esperando el Sr. Strano, el patron, para trabajar. Estabamos en una fila y cuando llegó Strano comenzó a pedir documentos (papeles). Yo presenté mi tarjeta de Residencia Permanente y lo puso al sol para examinar la tarjeta. Me dijo que no servía. Se lo enseñé otra vez y también le mostré la 'bacha' (Immokalee, Inc. badge) y me dijo que eso se puede conseguir en una tienda pagando un dolar. Me dijo que no servía. Entonces me fuí. (El no recibió entre 40-50 personas aunque no estoy seguro si las personas llevaban papeles o no.) Luego un señor que vende comida en el " field" miró mi permiso y dijo que estaba bien. El no entendía porque el Sr. Strano no me recibió.

10. **Afirmación y firma de la Parte Denunciante**

a) Si la Parte Perjudicada presenta esta queja:

Como persona que alega haber sido perjudicada por una práctica injusta de empleo relacionada con mi condición de inmigrante, entiendo que la Oficina del Consejero Especial pueda necesitar revelar mi identidad y otros datos durante la investigación de mi queja, durante cualquier audiencia u otro procedimiento resultante de mi queja, o en ciertas circunstancias en conformidad con la Ley de Libertad de Información. Para ello doy mi consentimiento. Afirmo que la información en este formulario, a mi mejor saber y entender, es verdadera

* Mariano Marcos Francisco — 2/25/93

(Firma de la Parte Perjudicada) *(Fecha)*

b) Si un representante autorizado por la Parte Perjudicada presenta esta queja:

A mi mejor saber y entender, afirmo que la información en este formulario es verdadera y que tengo la autorización de la Parte Perjudicada para presentar esta queja. Entiendo que la Oficina del Consejero Especial pueda necesitar revelar mi identidad y otros datos durante la investigación de esta queja, durante una audiencia u otro procedimiento resultante de esta queja, o en ciertas circunstancias en conformidad con la Ley de Libertad de Información: Para ello doy mi consentimiento.

_____ _____

(Firma del Representante Autorizado) *(Fecha)*

c) Si un funcionario del Servicio de Inmigración y Naturalización presenta esta queja:

A mi mejor saber y entender, afirmo que la información en este formulario es verdadera. Entiendo que la Oficina del Consejero Especial pueda necesitar revelar mi identidad y otros datos durante la investigación de esta queja, durante una audiencia u otro procedimiento resultante de esta queja, o en ciertas circunstancias en conformidad con la Ley de Libertad de Información. Para ello doy mi consentimiento.

_____ _____

(Firma del Funcionario del Servicio de Inmigración y Naturalización) *(Fecha)*

AVISO IMPORTANTE

CONCERNIENTE

A LAS PRACTICAS INJUSTAS DE EMPLEO RELACIONADAS CON LA CONDICION DE INMIGRANTE

La ley de inmigración de los Estados Unidos prohibe la discriminación basada en el origen nacional con respecto a la contratación, despido, o al reclutamiento o referencia por honorarios de

- Los ciudadanos o nacionales de los Estados Unidos y
- Los extranjeros con permiso para trabajar en los Estados Unidos

La ley también prohibe la discriminación basada en la ciudadanía con respecto a la contratación, despido, o al reclutamiento o referencia por honorarios de

- Los ciudadanos o nacionales de los Estados Unidos y
- Los extranjeros protegidos (residentes permanentes, residentes temporeros, refugiados y asilados)

El cumplimiento de esta ley está a cargo de la Oficina independiente del Consejero Especial ("Office of Special Counsel") del Departamento de Justicia. Como la ley requiere que las quejas se presenten en el plazo de **180** días a partir de la fecha del aceto de discriminación, si Ud. piensa que ha sido discriminado debe notificar **inmediatamente** a la Oficina del Consejero Especial.

Puede llamar al siguiente número de teléfono (llamada sin cargo):

1-800-255-7688
(653-8121 en Washington, D.C.)

Para los que tienen incapacidad auditiva:
1-800-237-2515
(296-0168 en Washington, D.C.)

O puede dirigirse a:

Office of Special Counsel
P.O. Box 65490
Washington, D.C. 20035-5490

DECLARACION DE LA LEY DE INFORMACION PRIVADA

La autoridad para solicitar esta información se encuentra en la Sección 1324b del Título 8 del Código de los Estados Unidos. La información facilitada se utilizará, principalmente, para la investigación y tramitación de su queja de discriminación prohibida; sin embargo, dicha información también se puede utilizar para otros fines legítimos, como se explica detalladamente en el aviso de esta Oficina publicado en el Registro Federal en el que se describe los usos ordinarios de la información obtenida por la Oficina. Si Ud. no facilita la información solicitada en el presente formulario, ello puede causar que se desestime o no se acepte su queja. Las declaraciones falsas, a sabiendas, en este formulario se castigan conforme a la Sección 1001 del Título 18 del Código de los Estados Unidos.

Departamento de Justicia
de los Estados Unidos
Oficina del Consejero Especial

Formulario para denunciar prácticas injustas de empleo relacionadas con la condición de inmigrante

Instrucciones

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U.S. Department of Justice
Office of Special Counsel
P.O. Box 65490
Washington, D.C. 20035-5490

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OFFICE OF SPECIAL COUNSEL U.R.U.E.P.A.

En el formulario, "Parte Perjudicada" es la persona que alega haber sido desfavorecida directamente por una práctica injusta de empleo relacionada con su condición de inmigrante o la persona supuestamente desfavorecida cuando la denuncia es presentada por un funcionario del Servicio de Inmigración y Naturalización o por un denunciante que no sea la Parte Perjudicada.

En este formulario, "Parte Denunciante" es: 1) la persona que presenta la queja ante el Consejero Especial alegando haber sido perjudicada directamente por una práctica injusta de empleo relacionada con su condición de inmigrante, o 2) la persona o empresa privada autorizada por una persona para presentar una queja ante el Consejero Especial alegando que la persona fue perjudicada directamente por una práctica injusta de empleo debido a su condición de inmigrante, o 3) un funcionario del Servicio de Inmigración y Naturalización que presenta una queja ante el Consejero Especial alegando que hubo una práctica injusta relacionada con la condición de inmigrante.

La "Parte Denunciante" deberá llenar toda la información solicitada en el formulario de denuncia escribiendo a máquina o con letra de imprenta. Preguntas no pertinentes deben dejarse en blanco.

Este formulario de denuncia deberá entregarse o enviarse por correo a la Oficina del Consejero Especial dentro de los 180 días de que ocurrió la supuesta discriminación.

Las preguntas sobre este formulario deberán dirigirse a la Oficina del Consejero Especial escribiendo a la dirección arriba mencionada o llamando al teléfono (202)653-8121 ó 1-800-255-7688 (llamada gratuita) y para las personas con incapacidad auditiva al (202)296-0168 ó 1-800-237-2515 (llamada gratuita).

1. Parte Denunciante

Nombre y Apellido:		Teléfono:
MARIO MIGUEL-MENDEZ		( ) NA
Otros nombres utilizados:		
NA		
Dirección: Calle:		
P.O. Box 294		
Ciudad:	**Estado:**	**Código Postal (ZIP):**
PALMETTO	FL	34221

Parte Perjudicada (Si la PARTE PERJUDICADA y la PARTE DENUNCIANTE son la misma persona, escriba "la misma")

Nombre y Apellido:		Teléfono
SAME		( )
Otros nombres utilizados:		
Dirección: Calle:		
Ciudad:	**Estado:**	**Código Postal (ZIP):**

2. Persona, empresa o entidad que, en su opinión, ha discriminado injustamente en el empleo

Nombre y Apellido:		Teléfono (si lo sabe):
Rosie Strano/ Strano Farms		(305) 247-2362
Dirección: Calle:		
75 W. Palm Drive		
Ciudad:	**Estado:**	**Código Postal (ZIP):**
Florida City	FL	33034

FORM OSC-IA
APR. 92

3. La persona, empresa o entidad tiene (marque una casilla):

☐ Menos de 15 empleados pero más de 3.

☐ 15 empleados o más.

☒ No puedo calcular el número de empleados.

4. La Parte Perjudicada fue víctima de discriminación en el empleo debido a (marque las casillas pertinentes):

☐ Discriminación por el origen nacional (en cuanto a la contratación, reclutamiento o referencia, o al despido de la Parte Perjudicada)

☐ Discriminación por la ciudanía (en cuanto a la contratación, reclutamiento o referencia, o al despido de la Parte Perjudicada)

☐ Represalias por hacer valer los derechos protegidos por la §1324 del Título 8 del Código de los Estados Unidos

☒ Uso indebido de documentos (la persona, empresa o entidad se negó a aceptar un documento válido o exigió otros o más documentos de los necesarios para llenar el Formulario I-9 del INS)

5. La Parte Perjudicada es:

☐ Cuidadano o nacional de los Estados Unidos (si marca esta casilla, pase al renglón 6)

☒ Extranjero con permiso para trabajar en los Estados Unidos (si marca esta casilla, debe completar el resto del renglón 5)

Si la PARTE PERJUDICADA es un extranjero autorizado para trabajar en los Estados Unidos:

No.(s) del Registro de Extranjeros: A 29357942

Fecha de nacimiento: 29 (día) 03 (mes) 70 (año)

Si la PARTE PERJUDICADA es un extranjero autorizado para trabajar en los Estados Unidos:

Parte Perjudicada (marque sólo si la casilla es pertinente):

☐ Fue admitida legalmente como residente permanente
Fecha en la que se la concedió la residencia: _____

☐ Es extranjero/a admitido/a legalmente como residente provisional conforme a las §1160(a) ó 1255a(a)(1) del Título 8 del Código de los Estados Unidos

☐ Fue admitida como refugiado/a conforme a la §1157 del Título 8 del Código de los Estados Unidos

☐ Se le concedió asilo conforme a la §1158 del Título 8 del Código de los Estados Unidos

☒ Tiene otra autorización para trabajar

Parte Perjudicada (marque una casilla):

☐ solicitó la naturalización
fecha en que presentó la solicitud: _____

☒ no solicitó la naturalización

6. ¿Cuándo ocurrió la práctica injusta? (fecha) 2/25/93

7. ¿Dónde ocurrió la práctica injusta? (lugar) Rosie Strano's field on N. Krome Ave., Homestead, FL
(Strano Farms 75 W. Palm Drive, Florida City, FL 33034)

8. **¿Ha presentado una queja basada en esta serie de hechos ante la Comisión para Igualdad de Oportunidades de Empleo (EEOC o cualquier otra agencia gubernamental?**

☐ Sí

☒ No

En caso afirmativo, ¿en qué oficina? _____

Dirección: _____

Ciudad: _____ Estado: _____ Código Postal: _____

Fecha en que la presentó: _____ No. del registro (si lo sabe): _____

9. **Describa la práctica injusta de empleo** (utilice hojas adicionales si es necesario)

Estuve esperando en el 'field' para trabajar y llegó el Sr. Strano y me dijo que le ensenara mi permiso. Lo miro hacía el sol y dijo que estaba vencido. Luego me dijo que me saliera a la carretera. Despues le mostré mi i.d. (de la Florida) y me dijo que él no estaba pidiendo ese i.d. Luego él y otro señor comenzaron a gritar que todas las personas que tuvieran papeles se subieran a los buses. Yo traté de subirme. En la puerta había un señor y le enseñé mi permiso de nuevo y dijo que no servía y no me dejo subir. (Sí dejo que otros subieran.) Luego me fui.

10. **Afirmación y firma de la Parte Denunciante**

a) Si la Parte Perjudicada presenta esta queja:

Como persona que alega haber sido perjudicada por una práctica injusta de empleo relacionada con mi condición de inmigrante, entiendo que la Oficina del Consejero Especial pueda necesitar revelar mi identidad y otros datos durante la investigación de mi queja, durante cualquier audiencia u otro procedimiento resultante de mi queja, o en ciertas circunstancias en conformidad con la Ley de Libertad de Información. Para ello doy mi consentimiento. Afirmo que la información en este formulario, a mi mejor saber y entender, es verdadera

X Mario Miguel Mendez — 02/25/93

(Firma de la Parte Perjudicada) *(Fecha)*

b) Si un representante autorizado por la Parte Perjudicada presenta esta queja:

A mi mejor saber y entender, afirmo que la información en este formulario es verdadera y que tengo la autorización de la Parte Perjudicada para presentar esta queja. Entiendo que la Oficina del Consejero Especial pueda necesitar revelar mi identidad y otros datos durante la investigación de esta queja, durante una audiencia u otro procedimiento resultante de esta queja, o en ciertas circunstancias en conformidad con la Ley de Libertad de Información. Para ello doy mi consentimiento.

_____ _____

(Firma del Representante Autorizado) *(Fecha)*

c) Si un funcionario del Servicio de Inmigración y Naturalización presenta esta queja:

A mi mejor saber y entender, afirmo que la información en este formulario es verdadera. Entiendo que la Oficina del Consejero Especial pueda necesitar revelar mi identidad y otros datos durante la investigación de esta queja, durante una audiencia u otro procedimiento resultante de esta queja, o en ciertas circunstancias en conformidad con la Ley de Libertad de Información. Para ello doy mi consentimiento.

_____ _____

(Firma del Funcionario del Servicio de Inmigración y Naturalización) *(Fecha)*

AVISO IMPORTANTE

CONCERNIENTE

A LAS PRACTICAS INJUSTAS DE EMPLEO RELACIONADAS CON LA CONDICION DE INMIGRANTE

La ley de inmigración de los Estados Unidos prohibe la discriminación basada en el origen nacional con respecto a la contratación, despido, o al reclutamiento o referencia por honorarios de

- Los ciudadanos o nacionales de los Estados Unidos y
- Los extranjeros con permiso para trabajar en los Estados Unidos

La ley también prohibe la discriminación basada en la ciudadanía con respecto a la contratación, despido, o al reclutamiento o referencia por honorarios de

- Los ciudadanos o nacionales de los Estados Unidos y
- Los extranjeros protegidos (residentes permanentes, residentes temporeros, refugiados y asilados)

El cumplimiento de esta ley está a cargo de la Oficina independiente del Consejero Especial ("Office of Special Counsel") del Departamento de Justicia. Como la ley requiere que las quejas se presenten en el plazo de **180** días a partir de la fecha del aceto de discriminación, si Ud. piensa que ha sido discriminado debe notificar **inmediatamente** a la Oficina del Consejero Especial.

Puede llamar al siguiente número de teléfono (llamada sin cargo):

1-800-255-7688
(653-8121 en Washington, D.C.)

Para los que tienen incapacidad auditiva:
1-800-237-2515
(296-0168 en Washington, D.C.)

O puede dirigirse a:

Office of Special Counsel
P.O. Box 65490
Washington, D.C. 20035-5490

DECLARACION DE LA LEY DE INFORMACION PRIVADA

La autoridad para solicitar esta información se encuentra en la Sección 1324b del Título 8 del Código de los Estados Unidos. La información facilitada se utilizará, principalmente, para la investigación y tramitación de su queja de discriminación prohibida; sin embargo, dicha información también se puede utilizar para otros fines legítimos, como se explica detalladamente en el aviso de esta Oficina publicado en el Registro Federal en el que se describe los usos ordinarios de la información obtenida por la Oficina. Si Ud. no facilita la información solicitada en el presente formulario, ello puede causar que se desestime o no se acepte su queja. Las declaraciones falsas, a sabiendas, en este formulario se castigan conforme a la Sección 1001 del Título 18 del Código de los Estados Unidos.

MIGUEL-MENDEZ, MARIO
DJ# 197-18-60

I was waiting in the field to work and Mr. Strano arrived and told me to show him my work permit. He looked at it under the sun and said that it had expired. Then he told me to leave and go out to the highway. Then I showed him my I.D. (of Florida) and he said that he wasn't asking for that I.D. Then he and another man began to yell that all those with papers get on the buses. I tried to get on a bus. At the door there was a man and I showed him my work permit again and he said that it wasn't valid and didn't let me get on the bus. (But he did let others get on the bus.) Then I left.

UNITED STATES DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

IN RE CHARGES OF
P. CACATZUM,
P.T. CACATZUM,
M. FRANSISCO, M. MENDEZ,
B. VELASQUEZ & L. PASCUAL

OCAHO CASE NO.
93B00182

UNITED STATES OF AMERICA,

Complainant,

v.

ROSARIO STRANO and
VITO STRANO
d/b/a STRANO FARMS,

Respondent.

DEMAND FOR JURY TRIAL

_____/

Respondents demand jury trial of all issues in this case consequent on paragraph B.6. of the prayer for relief. Respondent's further object to the conduct of such a trial by an article I tribunal and note the absence of statutory authority for O.C.A.H.O. to conduct such a trial.

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by first class mail this 28 day of February, 1993 on: William Ho-Gonzalez, Esq., Special Counsel for Immigration-Related Unfair Employment Practices, P.O. Box 27728, Washington, DC 20038-7728; P. Cacatzum, P.T. Cacatzum, M. Mendez, B. Velasquez, L.

Pascual c/o Mariano Marcos-Francisco, 15761 S.W. 293 Terrace, #262, Homestead, Florida 33030.

Respectfully submitted,

ROBERT M. HUSTEAD, P.A.
Attorneys for Respondent
70 Northwest 8th Street
Homestead, Florida 33030
Tel. (305) 246-3319

/s/ Robert M. Hustead
Robert M. Hustead

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION
REVIEW OFFICE OF THE CHIEF
ADMINISTRATIVE HEARING OFFICER

April 12, 1994

UNITED STATES OF AMERICA, Complainant	)	8 U.S.C. 1324b Proceeding
vs.	)	
ROSARIO STRANO & VITO STRANO, D/B/A STRANO FARMS, Respondents	)	OCAHO Case No. 93B00182

ORDER DENYING RESPONDENTS' DEMAND FOR JURY TRIAL

On March 3, 1994, respondents filed a Demand for Jury Trial, requesting therein a "jury trial of all issues in this case consequent on paragraph B.6 of the prayer for relief."

This Office is tasked with adjudicating all charges and claims asserted under 8 U.S.C. §§1324a and 1324b and no jury trials are provided. Instead, as provided for in 8 U.S.C. §1324a(e)(3)(B) and 8 U.S.C. §1324b(e)(2), hearings are to be conducted by administrative law judges in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. 551, *et seq.*

Furthermore, implicit in the unfair immigration-related employment practices provisions of IRCA, 8 U.S.C. § 1324b, is the proposition that the administrative law judge has sole jurisdiction to determine all questions

of law *and* fact. In particular, 8 U.S.C. § 1324b(g)(2)(A) provides:

> If, upon the preponderance of the evidence, *an administrative law judge determines that any person or entity named in the complaint has engaged in or is engaging* in any such unfair immigration-related employment practice, *then the judge shall state his findings of fact* and shall issue and cause to be served on such person or entity an order which requires such person or entity to cease and desist from such unfair immigration-related employment practice.

The procedural regulations, however, do expressly state: "The Administrative Law Judge shall have jurisdiction to decide all issues of fact and related issues of law." 28 C.F.R. § 68.39(b).

Respondents contend, that notwithstanding these provisions, paragraph B.6 of the prayer for relief entitles them to a jury trial because in that paragraph, complainant requests that the undersigned "(o)rder respondent to pay the injured parties full back pay with interest."

The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.

In *Atlas Roofing Co. v. Occupational Safety Comm'n*, 430 U.S. 442 (1976), however, the Court held that when Congress creates new statutory "public rights," it may assign

the adjudication of those rights to an administrative agency with which a jury trial would be incompatible without violating the Seventh Amendment's injunction that jury trial is to be "preserved" in "suits at common law." *Id.*, 430 U.S. at 455. *See also Connors v. Ryan's Coal Co., Inc.* 923 F.2d 1461, 1465 (11th Cir. 1991) ('when Congress creates a new cause of action and remedies unknown to the common law, it may vest fact-finding in a tribunal other than a jury, free from the strictures of the Seventh Amendment'); *Paul v. Office of Thrift Supervision,* 763 F. Supp. 568, 573-74 (S.D. Fla. 1990) ('Congress may delegate fact finding powers to an administrative agency in actions to enforce public rights').

Congress does not, however, have the power to strip parties contesting matters of "private right" of their constitutional rights to jury trial by devising novel causes of action involving those traditional private rights and assigning their adjudication to tribunal without statutory authority to employ juries as factfinders. *Granfinanciera. S.A. v. Nordberg,* 492 U.S. 33, 51-52, 109 S. Ct. 2782, 2795 (1989). A "private right" involves the liability of one individual to another under the law as defined. *See Joy Technologies, Inc. v. Manbeck,* 959 F.2d 226, 228 (Fed. Cir. 1992) (quoting *Crowell v. Benson,* 285 U.S. 22, 51 (1932)).

Thus, in order for Congress to have permissibly assigned the adjudication of actions under 8 U.S.C. § 1324b to the administrative law judges in this Office, those rights must be "public rights" as that term is defined in *Atlas* and in subsequent caselaw.

In *Atlas,* the Court defined the term "public right" as a situation in which "the Government is involved in its

sovereign capacity under an otherwise valid statute creating enforceable public rights." *Atlas*, 430 U.S. at 458.

Because paragraph B.6 in the prayer for relief does not implicate the government but rather solely deals with the entitlement of the charging parties to relief, respondents apparently believe that those claims involve "private rights," entitling them to a jury trial.

The proposition that the Federal Government (here, OSC) is not a party to that part of this action involving the charging parties' entitlement to backpay is questionable; because respondents failed to expound on why they believed a jury trial to be in order, it can only be assumed that that is the basis of respondents' objections.

Assuming, however, that OSC is not a party to that portion of the Complaint seeking backpay for the charging parties, respondents are still not entitled to a jury trial, because caselaw subsequent to *Atlas* indicates that the Federal Government need not be a party to an action for a case to implicate "public rights." *Granfinanciera*, 492 U.S. at 55, 109 S. Ct. at 2797.

Where the Federal Government is not involved as a party, adjudication by a non-Article III tribunal is still appropriate where "Congress, acting for a valid legislative purpose pursuant to its Constitutional powers under Article I, has created a seemingly 'private right' that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Id.* That is clearly the case here, and in all private actions under 8 U.S.C. § 1324b.

Congress passed the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324b, and its subsequent amendments in the Immigration Act of 1990 (IMMACT 1990), pursuant to its power to regulate immigration.

The authority to order that individuals who have been subjected to unfair immigration-related employment practices under 8 U.S.C. § 1324b be hired and, if appropriate, receive backpay, is granted by Congress to the administrative law judges in this Office in 8 U.S.C. § 1324(g)(2)(B)(iii).

In their "Demand for Jury Trial," respondents also contest OCAHO's authority to conduct the hearing in this matter.

OCAHO derives its authority to conduct hearings under 8 U.S.C. § 1324b from two separate sources.

First, in Attorney General's Order Number 1243-87 (12/17/87), the Attorney General delegated his authority under IRCA, 8 U.S.C. § 1324b(e)(2), to determine what constitutes special training respecting employment discrimination and to designate those administrative law judges who have received that training to the CAHO.

Second, the CAHO is ordered under the regulations specifying the organization of the Department of Justice to provide general supervision to the administrative law judges in this Office in performance of their duties in accordance with IRCA, 8 U.S.C. §§ 1324a and 1324b.

Accordingly, the CAHO has been granted the authority to designate administrative law judges in actions

under 8 U.S.C. § 1324b, and has been granted the authority to supervise those administrative law judges in the performance of their duties under that section.

Under 8 U.S.C. §1324b, the administrative law judges in this Office are responsible for hearing cases in actions involving unfair immigration-related employment practices (8 U.S.C. § 1324b(e)(2)) and for issuing orders in those actions (8 U.S.C. § 1324b(g)(1)).

For the foregoing reasons, respondents' Demand for Jury Trial is denied.

/s/ Joseph E. McGuire
Joseph E. McGuire
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 1994, I have served copies of the foregoing Order Denying Respondent's Demand for Jury Trial to the following persons at the addresses shown, in the manner indicated:

Office of Chief Administrative Hearing Officer
Skyline Tower Building
5107 Leesburg Pike, Suite 2519
Falls Church, Virginia 22041
(original hand delivered)

Rose A. Briceno, Esquire
Office of Special Counsel for Immigration
Related Unfair Employment Practices
P.O. Box 27728
Washington, D.C. 20038-7728
(one copy sent via regular mail)

Robert Hustead, Esquire
70 Northwest 8th Street
Homestead, Florida 33030
(one copy sent via regular mail)

/s/ Cathleen L. Lascari
Cathleen L. Lascari
Legal Technician to
Joseph E. McGuire
Administrative Law Judge
Department of Justice
Office of the Chief Administrative
Hearing Officer
5107 Leesburg Pike, Suite 2519
Falls Church, Virginia 22041
(703) 305-1043

Supreme Court, U.S.
FILED
MAY 19 1997
CLERK

No. 96-1479

In the Supreme Court of the United States

OCTOBER TERM, 1996

ROSARIO STRANO AND VITO STRANO,
dba STRANO FARMS, PETITIONERS

v.

DEPARTMENT OF JUSTICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
ISABELLE KATZ PINZLER
Acting Assistant Attorney General
DENNIS J. DIMSEY
LESLIE A. SIMON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the inclusion of back pay as one component of the relief awarded against petitioners in administrative proceedings under the Immigration Reform and Control Act of 1986 violated petitioners' rights under the Seventh Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1479

ROSARIO STRANO AND VITO STRANO,
dba STRANO FARMS, PETITIONERS

v.

DEPARTMENT OF JUSTICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1) is unpublished, but the decision is noted at 98 F.3d 1353 (Table). The opinion of the administrative law judge (Pet. App. 2-42) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1996. A petition for rehearing was denied on December 18, 1996. Pet. App. 43-44. The petition for a writ of certiorari was filed on March 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, Tit. I, 100 Stat. 3360, amended the Immigration and Nationality Act (INA) to prohibit employers from knowingly hiring aliens who are not authorized to work in the United States. INA § 274A, 8 U.S.C. 1324a.[1] The Act further requires employers to verify the employment eligibility of individuals hired after the effective date of the Act. 8 U.S.C. 1324a(a)(1)(B), 1324a(b). Employers comply with the verification requirement by preparing, for each new employee, an Employment Eligibility Verification Form, which requires the employer to certify that it has examined any of several specified forms of documentation, provided by the employee, to verify the employee's identity and eligibility for employment. 8 U.S.C. 1324a(b); 8 C.F.R. 274a.2(a). These provisions are enforced by the Attorney General through special administrative proceedings or, in cases involving a pattern or practice of violations, through civil or criminal actions in federal court. 8 U.S.C. 1324a(e)-(f).

To address fears that IRCA's imposition of employer sanctions would lead to employment discrimination against aliens who were, in fact, authorized to work, or against persons of particular national origins, Congress specifically defined such discrimina-

[1] Sections 274A and 274B of the INA (discussed below) have been amended since the time of the violations involved in this case. See, *e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, §§ 412, 421, 110 Stat. 3009-666, 3009-670. Unless otherwise noted the amendments are not pertinent here, and we cite the version of the Act reprinted in the 1994 edition of the United States Code.

tion as an "unfair immigration-related employment practice." 8 U.S.C. 1324b(a)(1); see H.R. Rep. No. 682, 99th Cong., 2d Sess., Pt. I, at 68-70 (1986). In 1990, Congress amended the Act to specify that asking an employee or job applicant to provide "more or different documents" than those specified as acceptable by the Act or its implementing regulations, or "refusing to honor documents tendered that on their face reasonably appear to be genuine," is to be treated as an unfair practice. 8 U.S.C. 1324b(a)(6) (as added by the Immigration Act of 1990, Pub. L. No. 101-649, Tit. V, § 535(a), 104 Stat. 5055).[2]

IRCA provides for appointment by the President, with the advice and consent of the Senate, of a Special Counsel for Immigration-Related Unfair Employment Practices within the Department of Justice. 8 U.S.C. 1324b(c). An individual (or government agent) who believes that an employer has engaged in an unfair immigration-related employment practice may file a charge with the Special Counsel, who is required to investigate the charge and to decide whether or not to bring a complaint before an administrative law judge (ALJ). 8 U.S.C. 1324b(b)(1), (c)(2), and (d)(1). The Special Counsel is "responsible * * * in respect of the prosecution of all such complaints" (8 U.S.C. 1324b(c)(2)), which are to be heard by specialized administrative law judges

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[2] These practices are generally referred to collectively as "document abuse." IIRIRA § 421, 110 Stat. 3009-670, amended this provision to specify that such a request or refusal to honor is an "unfair immigration-related employment practice" only "if made for the purpose or with the intent of discriminating against an individual in violation of" 8 U.S.C. 1324b(a)(1). That amendment is effective to "requests made" on or after September 30, 1996.

(8 U.S.C. 1324b(e)(2)).[3] An ALJ who finds that an employer committed an unfair practice is required to enter a cease-and-desist order directed to the employer. 8 U.S.C. 1324b(g)(2)(A). The ALJ may also order the employer to comply with the law; to retain certain additional records; to hire individuals directly and adversely affected by the employer's violation, "with or without back pay"; to pay civil penalties according to a graduated schedule specified in the Act; to post notices to employees concerning their rights and the employer's obligations under the Act; to educate employer personnel involved in hiring about the Act's requirements; and, in appropriate cases, to lift restrictions imposed on an employee and to expunge inappropriate records from an employee's personnel file. 8 U.S.C. 1324b(g)(2)(B). The ALJ's orders are subject to review in the court of appeals, and final orders may be enforced by the court of appeals or by a federal district court. 8 U.S.C. 1324b(i)-(j).

2. In March 1993, six farm workers filed charges with the Office of the Special Counsel (OSC), alleging that petitioners had engaged in unfair immigration-related employment practices. Pet. App. 3. After investigating the charges, the OSC filed a complaint (*id.* at 56-71) with the Office of the Chief Administrative Hearing Officer in the Justice Department's Executive Office for Immigration Review. The complaint alleged that petitioners had violated 8 U.S.C.

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[3] If the Special Counsel fails to file a complaint within 120 days after receiving a charge, the charging party may file such a complaint directly with the ALJ within 90 days after receiving notice of the Special Counsel's decision. 8 U.S.C. 1324b(d)(2).

1324b(a)(6) by requiring the charging parties to present more or different documents than are required under the INA to establish employment eligibility, and by refusing to honor documents tendered by the charging parties that on their face reasonably appeared to be genuine. Pet. App. 56-59. The complaint further alleged that petitioners had engaged in a pattern or practice of similar document abuse and of related discrimination on the basis of citizenship status, in violation of 8 U.S.C. 1324b(a)(1) and (6). Pet. App. 60-61. The complaint requested a variety of injunctive relief, the assessment of substantial civil penalties, and an order requiring petitioners to pay "back pay" to the charging parties. *Id.* at 61-62.

The OSC's complaint was referred to an administrative law judge. See 8 U.S.C. 1324b(e). The parties then engaged in "spirited" discovery. Pet. App. 8. Three of the original six charging parties were dismissed from the case, on OSC's motion, because they failed to appear for depositions and showed little interest in pursuing the matter. *Id.* at 5.

After rejecting petitioners' request for a jury trial (Pet. App. 74-79), the ALJ conducted an evidentiary hearing (see *id.* at 5). Based on the evidence at that hearing and the parties' additional submissions, the ALJ found that petitioners had committed the charged violations of the INA. *Id.* at 2-33. The ALJ entered an order (*id.* at 40-41) requiring petitioners to cease and desist from violating the relevant provisions. With respect to the document abuse violations involving the three remaining charging parties, the ALJ ordered petitioners to pay a civil penalty of $750, and to pay two of the three individuals involved a total of $9,919 in "back pay" and interest. *Id.* at 40-41. With respect to the "pattern or practice" counts of the

complaint, the ALJ ordered petitioners to pay the government civil penalties totalling $101,000.

3. On judicial review pursuant to 8 U.S.C. 1324b(i), the court of appeals summarily affirmed the ALJ's decision. Pet. App. 1.

ARGUMENT

The Office of the Special Counsel (OSC), specifically created by Congress to handle cases involving "unfair immigration-related employment practice[s]" prohibited by the Immigration and Nationality Act (INA) (see pages 4-5, *supra*), brought an administrative complaint against petitioners charging, among other things, that petitioners had committed "document abuse" violations with respect to three named individuals. The resulting order, entered by an administrative law judge (ALJ) after a full evidentiary hearing, required petitioners to stop violating the law, and to pay the government civil penalties of $750 based on those specific violations and $101,000 based on petitioners' "pattern or practice" of noncompliance. Petitioners contend (Pet. 17) that these proceedings deprived them of a Seventh Amendment right to trial by jury, because the ALJ's order also required them to pay two of the aggrieved individuals a total of $9,919 in "back pay" and interest. That contention does not merit review.

1. "Congress has often created new statutory obligations, provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred." *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450 (1977). That is what Congress did when it created the obligations and administrative enforce-

ment procedures at issue in this case. See pages 2-4, *supra*. As this Court has long recognized, "the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication." *Pernell* v. *Southall Realty*, 416 U.S. 363, 383 (1974) (quoted in *Atlas Roofing*, 430 U.S. at 454). Thus, "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'" *Atlas Roofing*, 492 U.S. at 455; see *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 51-55 & n.10 (1989) (defining "public rights"); see also *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 582-594 (1985) (discussing "public rights" in rejecting Article III challenge to administrative adjudication scheme); *CFTC* v. *Schor*, 478 U.S. 833, 847-858 (1986) (same).

Sixty years ago, in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937), the Court rejected a Seventh Amendment challenge to an order of the National Labor Relations Board that required an employer, among other things, to "make good the[] losses in pay" suffered by certain employees who had been injured by "unfair labor practices" proscribed by the National Labor Relations Act, 29 U.S.C. 151 *et seq.* 301 U.S. at 22. Although petitioners do not cite *Jones & Laughlin*, the administrative procedures they challenge are strikingly similar to those upheld in that case. Compare 8 U.S.C. 1324b with 29 U.S.C. 160; see also *Atlas Roofing*, 430 U.S. at 453 & n.10 (discussing *Jones & Laughlin* in rejecting Seventh Amendment challenge to administrative adjudication,

including assessment of civil penalties, under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*). There is no reason for a different result here.

2. Petitioners contend (Pet. 14-17) that Congress may not provide for back pay awards in administrative proceedings under 8 U.S.C. 1324b because such awards involve the adjudication of "private rights," as this Court defined that term in *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. at 51-55 & n.10. That is incorrect.

Cases brought to enforce the regulatory provisions of Sections 1324a and 1324b involve "public rights," because they "involv[e] statutory rights that are integral parts of a public regulatory scheme and whose adjudication Congress has assigned to an administrative agency." *Granfinanciera*, 492 U.S. at 55 n.10. As described above (pages 2-4, *supra*), the INA imposes sanctions on employers who hire persons not eligible to work in this country, and mandates particular means by which employers must verify eligibility. Because those sanctions might, by themselves, have undesired effects, the Act creates a new category of proscribed acts—"unfair immigration-related employment practices"—and provides a variety of associated remedies. Complaints are to be reported to and investigated by an administrative office created specifically for that purpose, and adjudicated by selected administrative law judges who not only specialize in the area of immigration but have received "special training respecting employment discrimination." 8 U.S.C. 1324b(e)(2).

Moreover, in this case, as in most cases under Section 1324b, the administrative action to remedy violations of the Act was brought by the Special

Counsel, whose office was created by Congress for that purpose. Thus, "th[e] statutory cause of action inheres in * * * the Federal Government in its sovereign capacity" (492 U.S. at 53), and the case "arise[s] between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive * * * department[]" (*id.* at 51 n.8). See also *Atlas Roofing*, 430 U.S. at 458 ("public rights" cases include those in which "the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights.").[4]

Finally, the bulk of the relief available under the Act, such as the cease-and-desist order and civil penalties (payable to the government) obtained in this case (Pet. App. 40-41), is unquestionably "public" in nature. See page 4, *supra*. The character of the proceeding does not change because the Act also confers on the ALJ the incidental power to award back pay to individuals as one component of an administrative remedial order sought and obtained by the Special Counsel. See 8 U.S.C. 1324b(g)(2)(B) ("Such an order also may require the person or entity — * * * (iii) to hire individuals directly and adversely affected, with or without back pay."); *Jones & Laughlin*, 301 U.S. at 48-49. Petitioners' contention that this case involves "private rights" is therefore without merit.

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[4] The administrative proceeding against petitioners was brought and prosecuted by the Special Counsel. See Pet. App. 2, 56, 62. This case therefore presents no question concerning cases brought and prosecuted solely by aggrieved individuals. See note 3, *supra*; compare *Granfinanciera*, 492 U.S. at 65-71 (Scalia, J., concurring in part and in the judgment).

3. Petitioners' argument (Pet. 11) that *Chauffeurs, Teamsters and Helpers Local No. 391* v. *Terry*, 494 U.S. 558 (1990), established "[t]he nature of back pay awards as common law or common-law analogous claims, carrying a right to jury trial" under the Seventh Amendment is similarly incorrect, and contradicted by the holding in *Jones & Laughlin*. *Terry* involved a suit brought in district court by private parties seeking monetary damages. See 494 U.S. at 562-563. This case, by contrast, involves a proceeding brought by a government officer before a specially constituted administrative tribunal, created by Congress for the sole purpose of "supplying speedy and expert resolutions of the issues involved." *Atlas Roofing*, 430 U.S. at 461; see pages 3-4, *supra*. This Court has recognized that that distinction is important for Seventh Amendment purposes. *Atlas Roofing*, 430 U.S. at 460-461; *Granfinanciera*, 492 U.S. at 51-53 & n.9; *Curtis* v. *Loether*, 415 U.S. 189, 194-195 (1974). Because adjudication of "unfair immigration-related employment practices" claims involves "public" rather than "private" rights, Congress's choice of forum forecloses petitioners' argument.[5]

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[5] For the same reason, there is no merit to petitioners' passing argument (Pet. 7, 13) that the decision in this case conflicts with *Wirtz* v. *Jones*, 340 F.2d 901, 904 (5th Cir. 1965), and *Lewis* v. *Times Publishing Co.*, 185 F.2d 457 (5th Cir. 1950), which held that jury trials are required in district court suits to recover amounts that should have been paid by an employer under the Fair Labor Standards Act. See also *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as precedent all decisions of the former Fifth Circuit handed down before October 1, 1981); *Davis* v. *United States*,

In addition, of course, the Seventh Amendment applies only to proceedings involving "legal," rather than "equitable," rights and remedies. *E.g. Terry*, 494 U.S. at 564-565. In holding that employees who sued their union in district court, alleging breach of the union's duty of fair representation, were entitled to a jury trial of their claim for damages (measured by wages lost because of the breach), the Court specifically rejected the suggestion that "any award of monetary relief must *necessarily* be 'legal' relief." 494 U.S. at 570 (quoting *Curtis*, 415 U.S. at 196). The Court distinguished the damages sought from the union, which had never employed the plaintiffs, from back pay awarded against an employer, which might constitute, or be incidental to, restitution or other equitable relief. 494 U.S. at 570-572. That distinction is consistent with *Jones & Laughlin*, which held (301 U.S. at 48), in the specific context of an administrative back pay award, that the Seventh Amendment "has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law." As this case demonstrates, back pay awards under Section 1324b are an incidental part of the overall equitable relief available under the Act.[6]

Indeed, the *Terry* Court was willing to assume—on the basis of considerable authority—that even back

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417 U.S. 333, 340 (1974) (intra-circuit conflicts); *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

[6] The fact that a back pay award may not be coupled with a reinstatement order in a particular case does not change the analysis. See *Atlas Roofing*, 430 U.S. at 453 n.10; see also *Radio Officers' Union of Commercial Telegraphers Union* v. *NLRB*, 347 U.S. 17, 54-55 (1954) (NLRB may order back pay without ordering reinstatement).

pay awarded to a private plaintiff in a civil damage action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, is "equitable" rather than "legal" relief for purposes of the Seventh Amendment. *Terry*, 494 U.S. at 571-572 (citing *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415-419 (1975), and *Lorillard* v. *Pons*, 434 U.S. 575, 581-582 (1978)); see also *Lehman* v. *Nakshian*, 453 U.S. 156, 164 (1981) ("[O]f course, * * * there is no right to trial by jury in cases arising under Title VII."); but see *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 252 n.4 (1994) (reserving the issue). Any relief that could be awarded by an Article III court in the absence of an underlying jury verdict could, a fortiori, be awarded by an administrative tribunal without violation of the Seventh Amendment. See *Granfinanciera*, 492 U.S. at 53-54. Thus, there is no inconsistency between this Court's discussion in *Terry* and Congress's decision to provide for administrative factfinding in the administrative proceedings at issue in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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